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ALEXANDER L. STEVAS,
CLERK

No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

v.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT
OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

C. Lawrence Wiser
10605 Concord Street
Suite 400
Kensington, Md 20895
(301)949-7870

Appellant

QUESTION PRESENTED

1. Whether gerrymandering of districts drawn for election of members of a state legislature is a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those against whom the gerrymandering is directed.

PARTIES TO THE PROCEEDING BELOW

The Parties to the proceeding below are as follows:

Petitioner: C. Lawrence Wiser, a registered voter in Montgomery County, Maryland.

Amicus Curiae: Bruce A. Goldensohn, Mayor of the City of Gaithersburg, Maryland.

Amicus Curiae: Mayor and Council of Rockville, Maryland.

Respondent: Harry R. Hughes, Governor of Maryland.

Respondent-Intervenors: Senators Victor L. Crawford, Howard A. Denis, Sidney Kramer, Lawrence Levitan, Margaret C. Schweinhaut, S. Frank Shore and Delegates Stewart Bainum, Jr., Mary Boergers, Joel Chasnoff, Jennie M. Forehand, Idamae Garrott, Marilyn Goldwater, Sheila Ellis Hixson, Jerry H. Hyatt, Nancy K. Kopp, Helen Koss, Lucille Maurer, Constance A. Morella, Joseph E. Owens, Donald B. Robertson, Ida G. Ruben, Patricia R. Sher, and Judith C. Toth, Members of the Montgomery County Legislative Delegation (being all of the members of such Delegation except two Delegates who did not participate as Intervenors).

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE

DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

vs.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT OF APPEALS

OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant, C. Lawrence Wiser, appeals from the final Per Curiam Order of the

Court of Appeals of Maryland dated June 4, 1982 dismissing Appellant's Petition that the State legislative districts as drawn for Montgomery County, Maryland violate the equal protection provision of the Fourteenth Amendment to the United States Constitution.

THE OPINIONS BELOW

The Court of Appeals Per Curiam Opinion issued June 4, 1982 is unreported and is reprinted in the Append hereto, A-1 to A-4. The Report of the Special Master appointed by the Court of Appeals is unreported and is reprinted in the Appendix at A-5 to A.48.

JURISDICTION

The Per Curiam Order of the Court of Appeals of Maryland dismissing

Appellant's Petition was entered on June 4, 1982.

A Notice of Appeal to this Court was duly filed in the Court of Appeals of Maryland on August 30, 1982 (reprinted in the Appendix at A-82). This appeal is being docketed in this Court within 90 days from the entry of the final Order below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2) on the grounds that the Court of Appeals of Maryland found that House Joint Resolution No. 32 (which is the 1982 Legislative Districting Plan for the State of Maryland) did not violate the United States Constitution. In the alternative, Appellant requests that the Court treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

STATUTE INVOLVED

This case involves House Joint Resolution No. 32 (the 1982 Legislative Districting Plan for the State of Maryland) which was passed by the House of Delegates and the Senate of Maryland at their 1982 legislative session. The portion of this Resolution insofar as it relates to Montgomery County, Maryland (which is the portion challenged by Petitioner) is reprinted in the Appendix at A-49 to A-74).

This Joint Resolution draws districts in the State of Maryland for the purpose of electing members of the Maryland Senate and House of Delegates and was prepared as required by the Maryland Constitution after the completion of the 1980 federal census of population.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution ...No State shall...deny to any person within its jurisdiction the equal protection of the laws.

RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings, appellant raised the claim in his original Petition filed with the Court of Appeals of Maryland on March 2, 1982 that "The gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically, due process and equal protection of the laws."

Appellant raised the claim again in a Supplemental Memorandum of Petitioner filed with the Court of Appeals on April 14, 1982

and again in his Memorandum of Petitioner in Opposition to Report of the Special Master filed with the Court of Appeals on May 26, 1982.

STATEMENT OF THE CASE

In accordance with the provisions of Article III, Section 5 of the Constitution of Maryland, on January 13, 1982 the Governor of Maryland submitted a legislative districting plan for the State to the Maryland General Assembly. It was introduced in the General Assembly on that day as House Joint Resolution 15 and Senate Joint Resolution 10.

On February 2, 1962, Delegate Helen Koss, Chairperson of the Constitution and Administrative Law Committee of the House of Delegates, introduced House Joint Resolution No. 32 in the Maryland House of Delegates. It was essentially

the same in content as House Joint Resolution No. 15 and Senate Joint Resolution No. 10 except that it contained certain technical amendments requested by the Governor, none of which related to the legislative districts in Montgomery County. The House of Delegates approved House Joint Resolution No. 32 (the "Legislative Districting Plan") on February 2, 1982 and the Senate approved it on February 26, 1982. Accordingly, under the provisions of Article III, Section 5 of the Constitution of Maryland, House Joint Resolution No. 32 became the legislative districting plan for Maryland.

The Legislative Districting Plan, insofar as it relates to Montgomery County, was exactly as proposed to the Governor's Advisory Commission by the members of the General Assembly of Maryland from Montgomery County.

The Legislative Districting Plan, insofar as it relates to Montgomery County, was drawn to protect every incumbent (of both political parties) from election opposition from other incumbents. Each of the six legislative districts drawn within Montgomery County contains one incumbent State Senator and three incumbent members of the House of Delegates. The one legislative district shared with an adjacent County contains one incumbent Senator who lives in the adjacent County that includes two-thirds of the district and one incumbent Delegate in the single member portion of that district in Montgomery County.

Pursuant to the provisions of Article III, Section 5 of the Constitution of Maryland, on March 2, 1982, appellant, as a registered voter and resident of Montgomery County, Maryland, filed in the Court of Appeals of Maryland a Petition to

Review the 1982 Legislative Districting of the State of Maryland insofar as it relates to Montgomery County on the grounds that the Legislative Districting Plan violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and violates the Maryland Constitution.

On March 5, 1982, the Court of Appeals entered an Order, appointing a Special Master to hold hearings and submit a Report to the Court containing his recommendations with respect to action to be taken by the Court on the Petition filed by appellant and other petitions filed by persons from other parts of the State.

The Special Master held hearings on April 14, 1982 and April 28, 1982 and subsequently on May 11, 1982 filed his Report (See Appendix at A-5 to A-48) in which he held that the legislative districts objected to by appellant did not

constitute unconstitutional gerrymandering under the Fourteenth Amendment (See Appendix at A-35 to A-37).

The Court of Appeals then held a hearing on June 1, 1982 at which the parties to the petitions were permitted to present their reasons in support of or in opposition to the Report of the Special Master. On June 4, 1982, the Court entered its Per Curiam Order dismissing Appellant's petition, Appendix A-1 to A-4.

Appellant contended in his briefs to the Special Master and the Court of Appeals that the legislative districts drawn to so protect all the incumbent legislators violate the equal protection clause of the United States Constitution because they were gerrymandered to elect incumbents living primarily in the southern half of the County. The gerrymandering

was done by drawing district boundaries that are bizarre, remote and meandering. Each of the three districts in the northern part of the County have "legs" that drop down into the southern part of the County to pick up incumbents living there.

Appellant contended that by gerrymandering the districts in this way, the portion of Montgomery County's population living in the northern part of the County was denied equal protection. See Map entitled "Governor's Plan" showing legislative districts, introduced as Petitioner's Exhibit #4 in the proceedings below, Appendix at A-75. See also Map entitled "New Districts" showing legislative districts and incumbents' residences introduced as Petitioner's Exhibit #5 in the proceedings below, Appendix at A-76.

Forty-Three percent (43%) of the population in the six legislative districts wholly within Montgomery County live north of the major cross county highway in Montgomery County, but none of the six incumbent Senators lives north of that highway and only five of the eighteen incumbent members of the House of Delegates for those districts live north of that highway (See Memorandum entitled "Population of Montgomery County and Residency of Incumbent Legislators North and South of Randolph Road" introduced as Petitioner's Exhibit #13 in the proceedings below, Appendix at A-77 to A-81). Petitioner lives north of that major cross county highway and is one of the citizens denied equal protection by the Legislative Districting Plan.

THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

Except where racial factors were involved, this Court has never rendered an opinion as to whether gerrymandering in the drawing of districts for the election of public officials is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Court's decisions in Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Simms, 377 U.S. 533 (1964) and other later cases have largely resolved the problems of legislative reapportionment with respect to disparities of population in drawing legislative districts.

However, throughout the United States the purpose of reapportionment, the redistribution of political representation

and power, is extensively being frustrated by gerrymandering in the drawing of districts for the election of public officials. If incumbents in declining population areas are permitted to gerrymander legislative districts so as to draw districts that permit them to represent not only the declining areas but also all of the growth areas, then the persons living in the areas of population growth are effectively being denied equal protection under the Fourteenth Amendment.

Since the legislatures draw the districts, the only way to protect the constitutional rights of those persons denied equal protection is through Court action.

Surely there can be no more basic right than the right to equal protection in the creation of legislative districts from which will be elected those who make the laws by which the community will be

governed.

Assuring equality of population is not enough to assure fair representation. Gerrymandering is an equally and perhaps even more dangerous threat to fair representation.

This Court has ruled in Gaffney v. Cummings 412 U.S. 735, 751 (1973) that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment".

The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439 (1965))

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population'.

In his concurring opinion, City of

Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 1510 (1980) Justice Stevens wrote

> Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering - not just to racial gerrymandering.

The goal of representative government which was the purpose of the reapportionment decisions by this Court has been effectively frustrated on a broad scale throughout our country by the political manipulation of gerrymandering. One authority has even gone so far as to state that "the gerrymander is a form of political manipulation similar to bribery, vote stuffing, etc." Hardy, Considering the Gerrymander, 4 Pepperdine Law Review 243, 244 (1977).

The gerrymander is the major obstacle to fair and effective

representation. It results in serious distortions in the political process. The goal of fair representation cannot be achieved unless the gerrymander is eliminated. "Gerrymandering can be as invidious as malapportionment of populatio n depriving voters of an equal voice in choosing their government, Edwards, The Gerrymander and "One Man, One Vote", 46 N.Y.U. Law Rev. 879 (1971).

This Court said in Reynolds v. Simms, supra:

> Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters as citizens of a State, stand in the same relation regardless of where they live.

While that decision related to apportionment of legislative members on the basis of equality of population, its reasoning and principle seems equally applicable to gerrymandering which dilutes the effective legislative representation of those who live in one area and benefits those who live in another area. That kind of gerrymandering effectively dilutes the votes of those living in the area against whom the gerrymandering is directed.

Gerrymandering is inherently a discrimination against some class of voter. By its very nature, it is a means of achieving a discriminatory result at the expense of that class of voter. It effectively gives greater weight to the votes of dominant or controlling political elements.

Gerrymandering, on the other hand,

> is universally recognized as being inherently invidious. The drawing of irrational district lines, like the creation of districts of unequal population, can have but one purpose: to discriminate against some class of voters.

Edwards, The Gerrymander and One Man, One Vote, supra.

Gerrymandering, whether or not racial factors are involved, is a discrimination against those toward whom the gerrymandering is directed and denies those persons equal protection.

The power to gerrymander gives those who wield it a tremendous advantage over those who do not and prevents the achievement of fair representation in government. The achievement of this goal can only be achieved by action by the Court since the power to draw new legislative districts in Maryland, as in most states, is in the hands of the legislature. The inherent conflict of

interest which the legislature has in drawing new legislative district boundaries, combined with the use of the gerrymander, undermines representative democracy and public confidence in the political process.

In Gaffney v. Cummings, supra, at 752, this Court (while stating that it was not a denial of equal protection to draw legislative districts that created a statewide districting plan which achieved a rough approximation of the statewide political strengths of the Democratic and Republican Parties) said at 754, "What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment".

The power to gerrymander is an abuse of power by members of the

legislature because of their desire for self-perpetuation in office. The inherent conflict of interest between that desire and the power to draw new legislative districts, together with the heavy advantages of individual incumbency and the natural mutual alliances of incumbents in an election leave the citizen who seeks fair representation, as a practical matter, only with the remedy of seeking redress from this Court to give guidance to Courts throughout our country on this basic issue, the resolution of which is essential to representative government.

The Legislative Districting Plan adopted for Montgomery County frustrates the very basic purpose of reapportionment which is the redistribution of political representation and power between areas of population growth and areas of

declining population. Under the Legislative Districting Plan, areas of growth in Montgomery County do not receive increased representation. Instead, the old representation in which most incumbents lived in and represented the southern portion of the County is preserved by carefully drawn districts of strange shapes so that all incumbents are in districts where they will not be opposed by other incumbents. This has been done even though most incumbents live in the lower part of the County while population growth has been in the upper part of the County.

Given the heavy advantages of incumbency in an election, this means that the newly proposed districts nearly assure that those who are legislators before reapportionment will all still be in office after reapportionment even though drastic changes in population

growth and concentration have occurred. By gerrymandering legislative districts which it drew to its own advantage, the Montgomery Legislative Delegation failed to represent the public interest. In the most blatant display of conflict of interest, the Montgomery Legislative Delegation acted to their own personal advantage and frustrated the whole purpose of reapportionment.

The natural result of reapportionment is that incumbents in areas of relatively declining portions of population must be combined in districts that do not overrepresent those areas at the expense of areas which have gained population. This is a difficult fact for incumbents to accept. But unless it is done, the redistribution of legislative representation which is the very purpose of reapportionment will have been completely frustrated.

Incumbents will not do it because of their self-interest. Therefore, in order to assure that reapportionment works to make our institutions of government representative of the people and to give the people the equal protection implied in reapportionment, this Court must act.

The battle for fair representation is largely being lost by gerrymandering which remains the last major obstacle to fair representation. The citizens against whom gerrymandering is directed are left with no practical remedy except this Court.

CONCLUSION

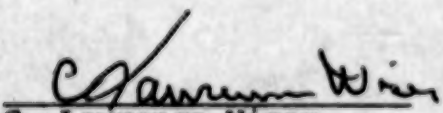
Appellant suggests that this Court's statement in its landmark decision for equal population requirements, Reynolds v. Sims, supra,

at 566 is applicable to the Constitutional defects of this legislative districting case:

> We are cautioned about the dangers of entering the political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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Appellant

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APPENDIX TO JURISDICTIONAL STATEMENT

C. Lawrence Wiser
10605 Concord Street
Suite 400
Kensington, MD 20895
(301) 949-7870

Appellant

IN THE COURT OF APPEALS OF MARYLAND

Misc. Nos. 2 through 11

September Term, 1982

IN THE MATTER OF

LEGISLATIVE DISTRICTING

OF THE STATE

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch,
J.J.

PER CURIAM ORDER

Filed: June 4, 1982

	*	In the
IN THE MATTER OF	*	Court of Appeals
LEGISLATIVE DISTRICTING	*	of Maryland
OF THE STATE	*	Misc. Nos. 2 through 11
	*	September Term 1982

PER CURIAM ORDER

WHEREAS, petitions were filed by various registered voters of the State with this Court as authorized by Section 5 of Article III of the Constitution of Maryland challenging the constitutionality of the 1982 Legislative Districting Plan which was approved and became law on February 26, 1982; and

WHEREAS, this Court appointed a Special Master to schedule hearings and to submit his findings of fact and conclusions of law to the Court; and

WHEREAS, this Court has considered the

findings and conclusions of the Special Master, the exceptions filed thereto and the oral arguments of the parties and amici curiae presented in support of their respective positions; now, therefore, it is this 4th day of June, 1982

ORDERED, by the Court of Appeals of Maryland, a majority of the Court concurring, that for reasons to be set forth in an opinion later to be filed, the petitions challenging the 1982 Legislative Districting Plan (House Joint Resolution No. 32) having failed to establish any violations of the federal constitution or the Constitution of Maryland, the exceptions to the Special Master's report taken by the State be, and they are hereby, sustained and all other exceptions are hereby overruled, and the legislative districts of the State shall be as established in and by House Joint Resolution No.

32; and it is further

ORDERED, that pursuant to the provisions of Section 5 of Article III of the Constitution of Maryland, the provisions of Section 9 of Article III of the Constitution shall govern the age, citizenship and residency requirements for election of Senators and Delegates to the General Assembly of Maryland except that for the primary and general elections of 1982, only, any person seeking election as a Senator or Delegate must have resided in the district which he or she seeks to represent not later than July 6, 1982.

/s/ Robert C. Murphy
Chief Judge

In the Matter of the Legislative Districting of the State 1982	* * * * * *	In the Court of Appeals of Maryland

TO THE HONORABLES, CHIEF JUDGE MURPHY AND THE ASSOCIATE JUDGES OF THE COURT OF APPEALS OF MARYLAND

REPORT OF THE SPECIAL MASTER

History of the Legislative Plan

A brief summary of the sequence of activities leading to eventual passage of H.J.R. 32 may be of value to the Court.

On April 13, 1981, Governor Harry Hughes appointed an Advisory Committee on Reapportionment (hereafter Advisory Committee) with the Honorable William S. James as Chairman, and with Senate President, James Clark, Jr.; House Speaker, Benjamin L. Cardin; Dr. C. Vernon Gray, a professor at Morgan State University; and Barbara Fetterhoff, a Republican and a member of the League of Women Voters, as Members.

The Advisory Committee conducted seventeen hearings in all parts of the State (see Minutes, Exhibit 1 P) between May 19, 1981 and December 8, 1981, and heard the testimony of 213 persons (see: Affidavit of James, Exhibits 2 H). Guidelines were adopted; legislative input was requested and a maximum standard of plus or minus 5% population deviation fixed (Exhibit 2 H).

For planning purposes, the State was divided into five regions; (1) Eastern Shore Planning Area (Eastern Shore and Harford County), 5 districts; (2) Baltimore City Planning Area, 9 districts; (3) Baltimore County Planning Area, 7 districts; (4) Central and Western Maryland Planning Area (the 5 Western Maryland Counties, Montgomery County, a small portion of Baltimore County and the excess population from Southern Maryland), 13 districts; (5) Central and Western Maryland

Planning Area (Southern Maryland and most of Anne Arundel and Prince George's Counties, 13 districts).

The Advisory Committee made this brief summary of its labors:

> "The Committee plan is entirely consistent with its goal of substantial population equality.
>
> No senatorial district contains a population deviation of + 5%. Although it was constitutionally impossible to maintain all county lines, the Committee strove to keep intact all municipal lines to fashion compact and contiguous districts. Finally, the Committee's Plan does not dilute existing minority strength and, in fact, in some cases augments that strength." (Affidavit of James, Exhibit 2 H, p. 3).

The Report of the Advisory Committee may be found in the Maryland Register, Part II, Vol. 8, Issue 25, dated 2/11/81, pp. 1-94 incl. (Exhibit 2 P).

Subsequent to the filing of the Report of the Advisory Committee, Governor Hughes conducted a hearing on December 21, 1981,

at which 24 witnesses spoke concerning redistricting in many State areas (see: Minutes, Exhibit 1 D-B); and on December 23, 1981, at which 46 witnesses addressed the issue of redistricting. (See: Minutes, Exhibit 1 D-C).

Governor Hughes adopted most of the recommendations of the Advisory Committee but did not do so with respect to 13A, 14A, and 14B (see: Affidavit Ex. 1 D).[1]

Federal and State constitutional questions are raised in all petitions filed in the subject proceedings. In the light of this fact and to avoid repetition of quotations from decided cases in the seriatum consideration of the several petitions, this report will discuss the decided cases believed to be controlling on the constitutional issues in accordance with the following outline:

1. United States Constitution

   a. Population equality

b. Freedom from invidious discrimination

2. Maryland Constitution.

United States Constitution

Population Equality

The seminal case concerning the constitutional power of the Federal Courts to control State action in the establishment of legislative districts within its borders is Baker v. Carr, 369 U.S. 186 (1962).

In Baker v. Carr, Mr. Justice Brennan, speaking for the Court, declared at page 197:

> "(W)e hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the 'Tennessee apportionment statutes.'"

The Supreme Court did not reach the merits of the cause, being content to declare that an adequate complaint had been filed.

Justice Frankfurther's dissent (joined only by Mr. Justice Harlan) declared that "The Court today reverses a uniform course of decision"[2] and stated that historically, "The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States";[3] distinguished the cases involving black disfranchisement;[4] stated tnat courts are not fit instruments of decision in "the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of government are made and unmade";[5] and particularly was critical of the Court's failure to

"vouchsafe the lower courts - State and federal - guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States."[6]

The first Supreme Court progeny explicating Baker v. Carr, not directly related to legislative redistricting, applied its holdings as to jurisdiction, justiciability and standing to State nominating procedures[7] and to State congressional redistricting,[8] and required population equality in all elections within the State.

Justice Frankfurter's forecast "of inevitable litigations" proved prophetic. In the course of 2-1/4 years following the decision in Baker v. Carr, a frenzy of

legislative and judicial activity occurred throughout the United States, culminating in six guideline decisions of the Supreme Court filed on June 15, 1964.

The leading case was Reynolds v. Sims, 377 U.S. 533, in which the Supreme Court held unconstitutional three Alabama legislative reapportionment plans. Under the existing plan, 25.7 percent of the state's population lived in counties which could elect a majority of the house, and 25.1 percent lived in senatorial districts electing a majority of the state senate. Under a proposed constitutional amendment, 43 percent of the state's population would live in counties electing a majority of the house, and only 19.4 percent of the state's population would elect a majority of the state senate. Under "standby" legislation, 37 percent of the state's population would elect a majority of the house, while 27.6

percent would elect a majority of the senate.

In rejecting these plans, the Court made the following holdings:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."
>
> (At p. 568.)

It noted that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents. What the Equal Protection Clause requires of the states, it said, is "an honest and good faith effort to construct districts, in both houses of its legislature; as nearly of equal population as is practicable." At 577.[9]

The definitive case explicating the permissible deviation from population equality in state legislative redistricting is Mahan v. Howell, 410 U.S. 315 (1973). In Mahan, supra, a four-judge District Court, relying on Kirkpatrick v. Preisler, 394 U.S. 526; Wells v. Rockefeller, 394 U.S. 542, and Reynolds v. Sims, supra, concluded that a maximum 16.4% variation in the legislative redistricting of Virginia required it to declare the legislative reapportionment statutes unconstitutional. In reversing the District Court, the Supreme Court explained that its decisions in Kirkpatrick, supra, and Wells, supra, dealt with congressional districting under the command of Article 1, Section 2 of the United States Constitution. Therefore, "(t)he principal question . . . presented for review is whether or not the Equal Protection Clause of the Fourteenth Amendment likewise

permits only 'the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality' in the context of state legislative reapportionment." (410 U.S. at 320; footnote omitted.) It concluded that

> "the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that Kirkpatrick and Wells make applicable to congressional reapportionment, but instead by the equal protection test enunciated in Reynolds v. Sims, supra . . . . We . . . reaffirm its conclusion that '(s)o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.' Id. at 579.[10]

Using this more flexible standard, the Court held that since the people of Virginia had decided to grant the General Assembly the power to enact local

legislation dealing with political subdivisions, the General Assembly's policy of maintaining the integrity of traditional county and city boundaries in drafting legislative district lines was constitutionally valid and that this policy was indeed furthered by the plan adopted by the legislature. The only remaining question was whether the population divergences resulting from the plan were within tolerable limits. On this point, the Court noted:

> "There was uncontradicted evidence offered in the District Court to the effect that the legislature's plan, subject to minor qualifications, 'produces the minimum deviation above and below the norm, keeping intact political boundaries . . . .' (Defendants' Exhibit 8.)" At 326.

The Court concluded that these population disparities did not exceed constitutional limits.

"Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the

Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations.

". . . We, therefore, hold the General Assembly's plan for the reapportionment of the House of Delegates constitutional and reverse the District Court's conclusion. . . ." At 329.

There having been no subsequent deviation from the rule announced in Mahan v. Howell, supra, it is plain that decisions in congressional redistricting litigation

simply are irrelevant insofar as population equality is concerned.

(b). Invidious Discrimination

The Supreme Court has held that invidious discrimination must be avoided against racial or ethnic minorities. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960); Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603 (1964); White v. Regester, 412 U.S. 755, 93 S.Ct. 2332 (1973); Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858 (1971); Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751 (1975); City of Mobile, Ala. v. Bolden, 446 U.S. 55, 100 S.Ct. 1490 (1980). It has also afforded this same protection to political groups. City of Mobile, Ala. v. Bolden, supra; Chapman v. Meier, supra; Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321 (1973); Whitcomb v. Chavis, supra; Reynolds

v. Sims, supra.

The Constitution of Maryland

Article III, Section 4 of the Constitution of Maryland reads as follows:

> "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions."

As previously shown, State action in applying and interpreting the above provisions of the Maryland Constitution is limited, restricted and constrained by the dual Federal constitutional imperatives of (a) "one person - one vote"; and (b) "freedom from invidious discrimination."

So, too, must State action in their application and interpretation be undertaken in the light of other

imperatives imposed upon those provisions by Maryland Constitution Article III, Section 2 and 3 that read as follows:

> "Section 2.
>
> The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.
>
> Section 3.
>
> The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multimember delegate district."

Compactness

The Supreme Court has clearly stated that a State may "legitimately desire to maintain the integrity of various political

subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." Reynolds v. Sims, supra, 84 S.Ct. at 1390. This Maryland has done in Article III, Section 4 of its Constitution, which provides:

> "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions."

Although facially the requirement that districts be "compact in form" appears to be a simple one, courts have almost uniformly recognized that the question of whether or not a Legislative District meets the constitutional test of "compactness" can only be answered in the context of the multiplicity of competing demands, some of imperative character, which legislatures

must consider in drawing an apportionment plan. So, any decision determining the meaning and effect of "compact" in the constitutional sense must be made in the light of the imperatives imposed by the United States Constitution, and the demands of priority, or limiting factors, imposed by the Maryland Constitution itself.

The paramount constraint under the Constitution of the United States is imposed by the Fourteenth Amendment. Baker v. Carr, supra, Reynolds v. Sims, supra, and Mahan v. Howell, supra, made crystal clear that all county, municipal or district lines, all natural or political subdivision boundaries, or the size and shape of any district must yield to the imperative that the State must make a good faith effort to create districts giving credit to the principle of one person - one vote, and must produce clear and convincing proof that any other than a slight

population deviation in its districting is the product of a rational state purpose.

Under the Constitution of Maryland, the General Assembly must consist of 47 Senators and 141 Delegates. Article III, Section 2. In addition, each Senatorial District shall provide one Senator and three Delegates (with an authorized but not compelled division into three single delegate districts or into one single member delegate district and one multimember delegate district. Article III, Section 3.) Finally, Section 4 of Article III requires that "due regard" be given to natural boundaries and the boundaries of political subdivisions. The constraining effect of this language in Section 4 must apply only to the provision of the "be compact in form" requirement of the section. This is so because: (1) the phrase "substantially equal population" constitutionally may be given no less

stringent effect than that imposed by Baker v. Carr, supra, and its progeny, and (2) the injunction that a district must "consist of adjoining territory" is one of precise definition as to which the "due regard" phrase is without meaning. Of course, a final constraint is that all districts bordering on the State line must conform thereto.

a. Population Equality as a Constraint on Compactness

The issue of paramount importance in any reapportionment plan is, of course, the achievement of substantial population equality. Thus, in Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225 (1969), the Supreme Court said:

> "Finally, Missouri claims that some of the deviations from equality were a consequence of

> the legislature's attempt to ensure that each congressional district would be geographically compact. However, in Reynolds v. Sims, supra, at 580, 84 S.Ct. at 1391, we said, 'Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. . . . In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances." (Emphasis added.)

394 U.S. at 535-36; 89 S.Ct. at 1231.

b. Other Constraints on Compactness.

Numerous state courts have also recognized that compactness is a relative concept, to be measured only in the context of the competing demands which make up the "political thicket" of reapportionment. In

this regard the Supreme Court of Rhode Island in Opinion to the Governor, 221 A.2d 799, 101 R.I. 203 (1966), stated at p. 802:

> "The term 'compact' has no precise or exact meaning within the context of the constitutional mandate to divide the state into districts which shall be 'as compact in territory as possible.' County of Norfolk v. City of Portsmouth, 186 Va. 1021, S.E. 2d 136. While a division into tightly packed districts with regular lines might literally satisfy the constitutional requirement, our state with its irregular boundaries, its bays and its inlets, its islands, its rivers and lakes and its many other geographical features is obviously not susceptible to being divided into circular planes or squares. Moreover, the overriding requirement that the districts must be as nearly equal in population as possible would prevent the accomplishment of any such division.
>
> The term 'compact' then, as it is used in the constitution, has reference to a principle, rather than to a definition, and has meaning only within an appropriate factual context. Its origins as a constitutional requirement lie in an intention to provide an electorate with effective representation rather than with a design

to establish an orderly and symmetrical geometric pattern of electoral districts."

The Court added, at 803:

"We are persuaded then that the requirement for territorial compactness...was intended to be peripheral in its thrust and to leave to the legislature the question of determining the territorial structuring that will provide districts as compact as possible. In short, whether there has been a complete departure from the requirement for compactness is a judicial question, but the determination of the territory that necessarily would have to be included in a district to provide that that district be as compact as possible is for legislative determination. In People ex rel. Woodyatt v. Thompson, 155 Ill. 451, at page 480, 40 N.E. 307, at page 315, the court noted: 'There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature.'"

Similarly, the New Jersey Supreme Court has held that:

"Compactness is an elusive concept. We noted in Scrimminger

> v. Sherwin, supra, 60 N.J. at 498, 291 A.2d 134, that it may be of limited utility in creating legislative districts in the light of the odd configurations of our State and its municipalities. It has never been held to constitute an independent federal constitutional requirement for State legislative districts. Gaffney v. Cummings, supra, 412 U.S. at 752, 93 S.Ct. at 2331, 37 L.Ed.2d at 312, footnote 18. This Court has suggested that population equality is distinctly paramount to it and that where districts are created on the basis of existing political subdivisions, compactness becomes a much reduced factor. Jackman v. Bodine, 49 N.J. 406, 419, 231 A.2d 193 (1967)." Davenport v. Apportionment Commission, 319 A.2d 718, 722, 65. N.J. 125 (1973).[11]

In yet a third major decision, Schneider v. Rockefeller, 340 N.Y.S.2d 889, 31 N.Y.2d 420, 293 N.E.2d 67 (1972), the New York Court of Appeals discussed at some length the competing considerations which legitimately may impinge on compactness in legislative districts:

> "The term compact, ...has no precise meaning within the context of the constitutional

mandate. Moreover, the Constitution does not provide unqualifiedly for compactness. (Matter of Sherrill v. O'Brien, supra.) At a minimum the Legislature may, in good faith, take account of existing political subdivision lines, topography, means of transportation and lines of communication without violating this standard. (Matter of Sherill v. O'Brien, supra.) Particularly where cities are concerned, the requirement of practical numerical equality may necessitate boundaries that are ragged at best. Moreover, it is manifest that our State, with its irregular boundaries, its islands, rivers, lakes and other geographical features

is not susceptible of division into circular planes or squares. Thus, it might be said that the constitutional requirement of compactness is peripheral in its thrust, forbidding a complete departure, yet leaving to the determination and discretion of the Legislature the degree of compactness which is possible in the total representation picture." 340 NYS2d at 896.

These same concerns were recognized by the Supreme Court of Pennsylvania in Commonwealth ex rel. Specter v. Levin, 448 Pa. 1, 293 A.2d 15 (1972), where the

Court cautioned:

> "Before any apportionment plan can be attacked for lack of compactness it must be recognized that there is a certain degree of unavoidable non-compactness in any apportionment scheme. The population density of this state is quite uneven, and therefore attempts to achieve the overriding objective of substantial equality of population will ordinarily necessitate the drawing of districts that are not models of geometric compactness. In addition, attempts to maintain the integrity of the boundaries of political subdivisions will add another increment of unavoidable non-compactness. Thus, in the words of one commentator: 'Dragons, bacon strips, dumbbells, and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served...." (footnote omitted.)
>
> at 23

Two cases present seemingly contrary authority. See In re Legislative Districting of General Assembly, 193 N.W.2d 784, 790-91 (Iowa, 1972); Acker v. Love, 496 P.2d 75 (Colo., 1972). The Master is

convinced, however, that these cases are readily distinguishable.

In short, the constitutional requirement for compactness should be considered in the light of what must be its principal purposes-the assurance of mutually reasonable access between citizens and their representatives for exchange of views and the prevention of discriminatory districting.

The use of mathematical measures of compactness that relate solely to geographic configurations do nothing to achieve either such purpose and no court has adopted them. As is pointed out in the Affidavit of Professor H. Peyton Young (Exhibit 2A) these mathematical tests give excellent grades to some very strange configurations.

The latest final State decision upon

the constitutionality of State legislative redistricting is: In re Reapportionment Plan for the Pennsylvania General Assembly, 442 A.2d 661 (S.Ct. Pa. Dec. 29, 1981).

The decision is in full accord with the cases previously cited and quoted herein. The Court, after quoting from Lucas v. Colorado, supra, that "in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole," stated at 668:

> "None of the arguments presented by appellants convinces us that the drawing of district lines, which necessarily involves value judgments by the Commission, has been based upon impermissible considerations. Mere dissatisfaction with the fact that certain political subdivisions have been divided or have been included within particular legislative districts is not sufficient to invalidate the Final

ReapportionmentPlan as unconstitutional. Moreover, the Supreme Court of the United States has made clear that 'neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Reynolds v. Sims, 377 U.S. at 579-80, 84 S.Ct. at 1391 (1964)."

See also Schrage v. State Board, 430 N.E.2d 483 (Ill. 1981).

MISCELLANEOUS PETITION 2
PETITION OF C. LAWRENCE WISER
MONTGOMERY COUNTY DISTRICTS

This Petitioner's attack would alter all districts and subdistricts within Montgomery County, namely 14A, 14B[12], 15, 16, 17, 18, 19 and 20.

His attack, mounted upon United States constitutional grounds alleges unconstitutional gerrymandering. His attack mounted upon Maryland constitutional grounds alleges violation of Article III, Section 4, in that (a) the Legislative Plan does not provide districts that are compact

in form; and (b) does not give due regard to natural boundaries and the boundaries of political subdivisions. He urges the additional ground, upon a somewhat ethereal unconstitutionality claim, an alleged failure to respect "communities of interest."

Except for the noted effect upon subdistrict 14B (see footnote), substitution of the Wiser Plan for the Legislative Plan would have no ripple effect upon districts beyond the borders of Montgomery County, unless such substitution was induced by the Court's acceptance of the Wiser theorum that the Legislative Plan was invalid by reason of the compactness requirements of Article III, Section 4 of the Constitution of Maryland, supra.

In the latter event the legislative plan would stand in jeopardy in Baltimore City, Baltimore, Howard, Anne Arundel, Calvert, St. Mary's, Charles, and all

counties of the Eastern Shore, where similar attacks grounded upon alleged lack of compactness have been made.

Unconstitutional Gerrymandering Under the Fourteenth Amendment

The sole evidential basis for the Wiser contention on the above ground is the fact that under the Legislative Plan the districts within Montgomery County have been constructed so that no more than one incumbent senator and three incumbent delegates have been placed in any single district.

The objectivity of Wiser on this ground is somewhat tarnished by the circumstances that (a) his own residence, under his own plan, is in a district with no incumbent senator; and (b) incumbents are forced into life and death election contests against each other by it.[13]

A serious question exists whether

challenge to a legislative districting plan upon the mere ground that it tends to minimize contests among present incumbents is justiciable.[14]

In any case, it seems clear that "districting for incumbents" does not per se establish invidious discrimination.[15]

Manifestly, formation of districts, otherwise constitutionally valid, wherein the electorate may choose between an incumbent and his challengers after full debate upon the political philosophy, competence and effectiveness of an incumbent thereby providing opportunity to the voters to re-elect or to reject, arguably serves a finer public purpose than the formation of districts, perhaps also otherwise constitutionally valid, wherein the electorate is given the Hobson's choice of being compelled to reject the services of one of two incumbents, both of whom the voter may

believe to be exceptionally able public servants.

No evidence is to be found in the record that "districting for incumbents" was the product of any plot, plan or scheme to diminish, dilute or cancel out the voting strength of any racial or political group. Neither is there any evidence that such is its effect.

There is no record evidence that the Legislative Plan conferred any special handicap or special benefit to any incumbent other than may have been earned in the performance of duty during his term of office.

Arguably, an incumbent properly should be permitted to receive the benefits stemming from his performance in office, or to suffer the handicaps occasioned by poor performance. His constituents properly should be permitted the opportunity, when possible, to make a judgment on the basis

of that performance without constraints imposed by districts proposing unnecessary contests between incumbents.

In the course of his final argument before the master, Petitioner Wiser (Misc. Petitioner 2) produced bi-color flash cards, allegedly depicting the effect upon his own and the legislative planned districts of the application of the several suggested "tests" for the determination of whether a district is "compact" in the constitutional sense. His apparent intention was to demonstrate that his plan was "better" than the legislative plan.

His flash cards, however, proved too much. Some showed that one or more of his own districts failed one or more of the very "tests" he urges the Court of Appeals to adopt for its determination of the meaning of "compact" in the constitutional sense.

Moreover, computer calculation of

Wiser District 18 shows it fails the suggested Reock test.[16] The computer calculation of Wiser District 17 shows it fails the suggested Schwartzberg test.

In addition, Wiser District 14 also fails the Schwartzberg test (See Exhibit 3A). This Petition should be dismissed.

(Decisions on other Petitioners relating to various parts of the State omitted)

Summary

I am persuaded that the Legislative Plan for the Redistricting of the State viewed as an entirety represents a good faith effort on the part of the State to meet all constitutional demands.

Some of the petitioners are requesting the Court of Appeals to do that which no Court in the United States has done - to bind itself to a suggested numbers game, a

game using numbers that admittedly are arbitrary and with not the slightest assurance that their use will produce fair representation, or freedom from invidious discrimination.

In the course of final argument, counsel for several petitioners spoke glibly about gerrymandering -- waving cut-outs of allegedly gerrymandered districts, yet with one exception[23], none was able to point to a single instance of discriminatory districting in the legislative plan.

Perhaps the most objective of all discussions of the theory and practice of fair representation and reapportionment, following Baker v. Carr, the late Professor Robert G. Dixon, exposed the invalidity of exalting form over substance when he wrote:

> "...all are familiar with the practice of devising odd-shaped districts for political advantage

- which is the historically derived and common popular usage of the term gerrymandering. Cartoonists, especially, have a field day in making 'snakes', 'turkey foots', 'frying pans,' and the like, emerge from sets of revised districts. 'Checker-board square' is the assumed ideal. Any significant deviations from such symmetry are deemed unclean and unjustifiable.

It may come as a surprise, therefore, to be told that this common understanding is highly unfortunate. It is unfortunate because it tends to preclude intelligent discussion of unfair partisan practices and results, in districting. It immediately casts attention in the wrong direction - toward superficialities of shape and size, rather than toward the political realities of district composition. These realities, as Robert Luce has so aptly observed, turn on the 'accident of sleeping place.' It is the particular nature of this 'accident of sleeping place' for a party's supporters which determines whether a set of symmetrical districts is fair, or is a clean-sweep gerrymander for that party. Not to perceive this is to confuse form with function, and even to prevent the asymmetrical designs dictated by considerations of political balance and minority representation, and dictated as well by normal preferences for giving some recognition to natural boundaries and political subdivi-

sions."[24]

He added:

> "Gerrymandering is discriminatory districting. It equally covers squiggles, multimember districting, or simple nonaction, when the result is racial or political malrepresentation."[25]

The legislative plan plainly is within the constitutional limits of population equality imposed by Baker v. Carr and its progency; with a single exception is free of any invidious discrimination either political or racial; and is composed of districts meeting all requirements of the Maryland Constitution when they are viewed in the light of (a) the geographical irregularities of the State and its political subdivisions; (b) the uneven population distribution in the State, and (c) the necessity to balance the sometime conflicting, competing or incompatible equities arising under Sections 1, 2 and

3 of Article III of the Constitution of Maryland.

Accordingly, it is recommended that the legislative plan be approved in all respects save District 44 (and by necessity 43) as to which the changes indicated by Appendix C are recommended.

I believe that any other course would prove chaotic.

Respectfully submitted,

W. Albert Menchine
Special Master

Footnotes to the Report of the Special Master

[1]The difference between the Advisory Committee Plan and the Legislative Plan will be discussed *infra* under the heading Miscellaneous Petition 3.

[2]At page 266; *compare*:
Colegrove v. Green, 328 U.S. 549 (1946);
MacDougall v. Green, 335 U.S. 281;
South v. Peters, 339 U.S. 276;
Anderson v. Jordan, 343 U.S. 912.

[3]At page 284.

[4]At page 285.

[5]At page 287.

[6]At page 267.

[7]Gray v. Sanders, 372 U.S. 368 (1963) (struck down under the 14th Amendment's Equal Protection Clause Georgia's county unit system for nomination of United States Senate candidates and candidates for statewide office).

[8]Westberry v. Sanders, 376 U.S. 1 (1963) (struck down congressional redistricting because "the command of Article 1, Section 2, that Representatives be chosen 'by the people of the several States,' means that as nearly as practicable one man's vote in a congressional election is to be worth as much an another's."

[9]The remaining five cases decided with *Reynolds*, *supra*, were WMCA v. Lomenzo, 377 U.S. 633 (1964) (invalidating New York's legislative apportionment plan, under

which 37.5% of the population lived in districts electing a majority of the state assembly, and 38.1% in districts electing a majority of the senate. The Court stated at page 635: "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a state's citizens merely because of where they happen to reside."); Maryland Committee v. Tawes, 377 U.S. 656 (1964) (holding unconstitutional Maryland's apportionment procedures, pointing out that 14.1% of the population would elect a majority of the senate, and 24.7% would elect a majority of the house, and adding that "(Maryland's) reliance on the so-called federal analogy as a sustaining principle for the Maryland apportionment scheme...is clearly misplaced." at 675); Davis v. Mann, 377 U.S. 678 (1964) (striking down Virginia's apportionment procedures, holding that attempts to balance urban and rural power do not justify deviations from population equality, even if those deviations do not exceed those found in the composition of the Federal Electoral College); Roman v. Sincock, 377 U.S. 695 (1964) (rejecting Delaware's apportionment procedures, noting, however, that reapportionment does not lend itself to precise, mathematical formulas. Rather, the issue is whether any minor deviations that do occur are free from "any taint of arbitrariness or discrimination" at 709); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) (declaring unconstitutional a state Constitutional Amendment, which was adopted by the Colorado electorate in 1962, which provided for the apportionment of the State

House on the basis of population, but which essentially maintained the existing apportionment of the senate, made on the basis of factors other than strict equality of population. Said the Court:

> "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters
>
> fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain the constitutionality or to induce a court of equity to refuse to act." At 736.

[10]Mahan v. Howell, supra, at 324-25.

[11]Article IV, §2, ¶3 of the New Jersey Constitution provides that Assembly districts shall be "as nearly compact...as possible."

[12]The only change suggested in Sub-District 14B (a 2-delegate district) is the removal of Montgomery County split precincts ED9-20 and 21 (population 1391), the effect of which would decrease the total sub-district population from 63,175 to 61,784.

[13]Petitioner Wiser is a former State Senator, defeated in the 1978 election, who concedes that he would like to be a senatorial candidate in the forthcoming election.

[14]See WMCA, Inc. v. Lomenzo, 238 F.Supp.

916 (S.D. N.Y. 1965), aff'd, per curiam, 382 U.S. 4, 86 S.Ct. 25, 15 L.Ed.2d 2 (1966) (holding that allegations of political gerrymandering do not present a justiciable issue); Russo v. Vacin, 582 P.2d 27 (7th Cir. 1976) (noting that force is added to the District Court decision in WMCA, Inc., supra, since it subsequently had become clear that lower federal courts are bound by summary actions of the Supreme Court, citing Hicks v. Miranda, 422 U.S. 334, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); Farrell v. State of Oklahoma ex rel. Hall, 339 F.Supp. 73 (W.C. Okla. 1972), aff'd, 406 U.S. 939 (1972) (holding that the issue of political gerrymandering at least in single member districting is nonjusticiable.

[15]Burns v. Richardson, 384 U.S. 86 S.Ct. 1286 (1966), at 89, footnote 16 ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."); White v. Weiser, 412 U.S. 783, 791, 93 S.Ct. 2348, 2352, 37 L.Ed.2d 335 (1973) (recognition of incumbency concerns is not in itself unconstitutional); Davenport v. Apportionment Commission, 319 A.2d 718, 65 N.J. 125, (1973) (Citing White v. Weiser, supra). Contra, In Re Legislative Districting of General Assembly, 193 N.W.2d 784 (Iowa).

[16]See Appendix A Response to Special Master's request for "Reapportionment Litigation - Information" paragraph 3 and its accompanying attachment C. Appendix in original only.

[23]District 44, discussed, supra.

[24]Democratic Representation, Oxford University Press, 1968, p. 459.

HOUSE JOINT RESOLUTION NO. 32

By: Delegate Koss

Introduced and read first time:

February 2, 1982

Assigned to: Constitutional and

Administrative Law

Committee Report: Favorable

House action: Adopted

Read second time: February 5, 1982

RESOLUTION NO. _____

HOUSE JOINT RESOLUTION

A House Joint Resolution concerning

Legislative Districting Plan of 1982

FOR the purpose of incorporating certain technical changes into the plan for legislative districting presented by the Governor pursuant to Article III, Section 5, of the Constitution of Maryland;

providing that such changes are intended to remove certain ambiguities and to implement the intent underlying the Governor's plan; making an internal change within a legislative district to improve, in a Delegate district, access originally inadvertently limited by an unbridged body of water; providing that this Joint Resolution shall be effective as a plan within the meaning of Article III, Section 5, of the Constitution of Maryland only under certain circumstances; providing that this Joint Resolution does not preclude the enactment by the General Assembly of a subsequent Joint Resolution setting forth the boundaries of legislative districts; and generally relating to the establishment of legislative districts pursuant to Article III of the Constitution of Maryland.

BY repealing

Article 40 - General Assembly

Section 46, 47, 47½, 47A, 47B, and 47C
Annotated Code of Maryland
(1978 Replacement Volume and 1981 Supplement)
BY adding to
Article 40 - General Assembly
Section 46, 47, 47A, 47B, and 47C to be under the amended subtitle "Legislative Districting Plan of 1982"
Annotated Code of Maryland
(1978 Replacement Volume and 1981 Supplement)

SECTION 1. BE IT RESOLVED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section(s) 46, 47, 47½, 47A, 47B, and 47C, inclusive, of Article 40 - General Assembly, of the Annotated Code of Maryland be repealed.

SECTION 2. AND BE IT FURTHER RESOLVED, That section(s) of the

Annotated Code of Maryland read(s) as follows:

Article 40 - General Assembly

Legislative Districting Plan of (1973) 1982

46.

(A) The State of Maryland is divided into 47 Districts for the Election of members of the General Assembly of Maryland.

(B) Each Legislative District shall elect 1 Senator and 3 Delegates.

(C) Each Legislative District may be subdivided into 3 single member Delegate Districts or into 1 single member Delegate District and 1 multimember Delegate District.

(D) In any Legislative District which contains more than 2 counties or parts of more than 2 counties, and where Delegates are to be elected at large by the voters of

the entire District, a county, or part of a county, may not have more than 1 Delegate residing in that District.

(E) The descriptions of the Legislative Districts set forth in this subtitle, including all references to election districts, wards, precincts, streets, highways, and other designations, are to the geographical boundaries or other designations as they existed on June 1, 1981.

47.

The Composition of the 47 Legislative Districts is

(portions of Resolution describing boundaries of legislative districts outside of Montgomery County omitted)

(14) Legislative District 14 consists of:

(A) Delegate District 14A (single member delegate district):

(I) Montgomery County Election District 5, Precincts 2, 8, 15, 17 and 18;

(II) Montgomery County Election District 5, that part of Precinct 1 that is generally north of a line running along the center of Good Hope Road from New Hampshire Avenue a distance of 2,100 feet to an unnamed stream which is the western fork of another unnamed stream (both of which are generally known as the Good Hope Branch Tributary to the Paint Branch), thence in a southeasterly direction along the center of the western fork to the second unnamed stream, and thence along the center of the second unnamed stream to Paint Branch;

(III) Montgomery County Election District 8, Precincts 1 and 5;

(IV) Montgomery County Election District 8, that part of Precinct 2 that is south of a line running along the center of Brighton Dam Road from the eastern precinct boundary to the intersection with the municipal boundary of the municipal

corporation of Brookeville, thence along the northern municipal boundary of the municipal corporation of Brookeville in a generally westerly direction to Brookeville Road, thence along the center of Brookeville Road so far as is required to reach the western precinct boundary;

(V) Montgomery County Election District 8, that part of Precinct 6 that generally is east and north of a line running in a northwesterly direction along the center of Norwood Road from the southern precinct boundary to the intersection of Dr. Bird Road, thence continuing in a northwesterly direction along the center of Dr. Bird Road to Maryland Route 108; and

(VI) Montgomery County Election District 8, that part of Precinct 7 that is generally west of a line running along the center of New Hampshire Avenue from Maryland Route 108 to Gold Mine Road,

thence in a westerly direction along the center of Gold Mine Road to the boundary line of Precinct 2 of Election District 8; and

(B) Delegate District 14B (2 member delegate district):

(I) Howard County Election Districts 2 and 3 in their entirety;

(II) Howard County Election District 5, Precincts 2, 3, 4, 7, 8, 9, and 10;

(III) Howard County Election District 5, that part of Precinct 1 that is west and north of a line running along the center of Maryland Route 108 from Hall Shop Road to Guilford Road, thence along the center of Maryland Route 32 to the western boundary of Precinct 5 of Election District 5;

(IV) Howard County election Dis-

trict 5, that part of Precinct 5 that is north of a line running along the center of Maryland Route 32 from Maryland Route 29 to Cedar Lane;

(V) Montgomery County Election District 1 in its entirety;

(VI) Montgomery County Election District 8, that part of Precinct 2 that is north of a line running along the center of Brighton Dam Road from the eastern precinct boundary to the intersection with the municipal boundary of the municipal corporation of Brookeville, thence along the northern municipal boundary of the municipal corporation of Brookeville in a generally westerly direction to Brookeville Road, thence along the center of Brookeville Road so far as is required to reach the western precinct boundary;

(VII) Montgomery County Election District 8, that part of Precinct 7 that is north and east of a line running along the

center of New Hampshire Avenue from Maryland Route 108 to Gold Mine Road, thence in a westerly direction along the center of Gold Mine Road to the boundary line of

Precinct 2 of Election District 8;

(VIII) Montgomery County Election District 9, that part of Precinct 20 that is generally east of a line that runs along the municipal boundary of the municipal corporation of Gaithersburg from Gaithersburg-Laytonsville Road to Emory Grove Road;

(IX) Montgomery County Election District 9, that part of Precinct 21 that is generally east and south of a line running along the center of Strawberry Knoll Road from Emory Grove Road to Snouffer's School Road; and

(X) Montgomery County Election District 9, that part of Precinct 21 that is north of a line meandering in a

generally westerly direction along the center of Cabin Branch from Snouffer's School Road to Goshen Road.

(15) Legislative District 15 consists of:

(A) Montgomery County Election Districts 2, 3, 6, 11, and 12 in their entirety;

(B) Montgomery County Election District 4, Precincts 12 and 20;

(C) Montgomery County Election District 4, that part of Precinct 17 that is west of a line running along the center of Seven Locks Road from Postoak Road to Tuckerman Lane;

(D) Montgomery County Election District 4, that part of Precinct 25 that is south of the municipal boundary of the municipal corporation of Rockville;

(E) Montgomery County Election District 9, Precincts 9, 12, 17, 18 and 19;

(F) Montgomery County Election Dis-

trict 9, that part of Precinct 1 that is bounded by a line that runs along the center of North Summit Avenue from the boundary of Election District 9, Precinct 7 to the municipal boundary of the municipal corporation of Gaithersburg, thence runs in a generally westerly and northerly direction along the northern municipal boundary of the municipal corporation of Gaithersburg to Oden'Hal Avenue, and thence runs generally easterly along the existing boundary line between Precincts 1 and 7 of Election District 9 to North Summit Avenue;

(G) Montgomery County Election District 9, all of Precinct 5 except that part generally south and west of the municipal boundary line of the municipal corporation of Gaithersburg;

(H) Montgomery County Election District 9, all of Precinct 7 except that part generally west of a line running along the

center of Lost Knife Road between Montgomery Village Avenue and Oden'Hal Avenue;

(I) Montgomery County Election District 9, that part of Precinct 8 that is generally northwest of a line meandering in a generally westerly direction along the center of Great Seneca Creek from Interstate 270 to Clopper Road;

(J) Montgomery County Election District 9, that part of Precinct 11 that is not within the corporate boundaries of the municipal corporation of Gaithersburg;

(K) Montgomery County Election District 9, that part of Precinct 15 that is generally east of the municipal boundary of the municipal corporation of Gaithersburg;

(L) Montgomery County Election District 9, that part of Precinct 21 that is generally west of a line running along the center of Strawberry Knoll Road from Emory

Grove Road to Snouffer's School Road, thence running north along the center of Snouffer's School Road from Emory Grove Road to Cabin Branch, and thence meandering in a generally westerly direction along the center of Cabin Branch to Goshen Road; and

(M) Montgomery County Election District 10, Precincts 1 through 6, inclusive, 8, 9 and 11.

(16) Legislative District 16 consists of:

(A) Montgomery County Election District 4, Precincts 10, 13, and 18;

(B) Montgomery County Election District 4, that part of Precinct 17 that is east of a line running along the center of Seven Locks Road from Montrose Road to Tuckerman Lane;

(C) Montgomery County Election District 4, that part of Precinct 28 that is bounded on the west and north by the municipal boundary line of the municipal

corporation of Rockville, on the east by Route 355, and on the south by Montrose Road;

(D) Montgomery County Election District 7, Precincts 3, 4, 7 through 15, inclusive, 17 through 20, inclusive, and 22 through 31, inclusive;

(E) Montgomery County Election District 10, Precincts 7 and 10; and

(F) Montgomery County Election District 13, Precinct 38.

(17) Legislative District 17 consists of:

(A) Montgomery County Election District 4, Precincts 2 through 9, inclusive, 11, 14, 15, 16, 21 through 24, inclusive, 26, 27, and 29;

(B) Montgomery County Election District 4, that part of Precinct 1 that is west of a line that runs along the center of Rock Creek;

(C) Montgomery County Election Dis-

trict 4, that part of Precinct 25 that is within the municipal boundary of the municipal corporation of Rockville;

(D) Montgomery County Election District 4, all of Precinct 28 except that which is bounded on the west and north by the municipal boundary line of the municipal corporation of Rockville, on the east by Route 355, and on the south by Montrose Road;

(E) Montgomery County Election District 9, Precincts 2, 3, 6, 13, and 16;

(F) Montgomery County Election District 9, all of Precinct 1 except that bounded by a line that runs along the center of North Summit Avenue from the boundary of Election District 9, Precinct 7 to the municipal boundary of the municipal corporation of Gaithersburg, thence runs in a generally westerly and northerly direction along the northern municipal boundary of the municipal corporation of

Gaithersburg to Oden'Hal Avenue, and thence runs generally easterly along the existing boundary line between Precincts 1 and 7 of Election District 9 to North Summit Avenue;

(G) Montgomery County Election District 9, that part of Precinct 5 generally south and west of the municipal boundary line of the municipal corporation of Gaithersburg;

(H) Montgomery County Election District 9, that part of Precinct 7 generally west of a line running along the center of Lost Knife Road between Montgomery Village Avenue and Oden'Hal Avenue;

(I) Montgomery County Election District 9, that part of Precinct 8 that is generally southeast of a line meandering in a generally westerly direction along the center of Great Seneca Creek from Interstate 270 to Clopper Road;

(J) Montgomery County Election Dis-

trict 9, that part of Precinct 10 that is within the municipal boundary of the municipal corporation of Gaithersburg;

(K) Montgomery County Election District 9, that part of Precinct 11 that is within the municipal boundary of the municipal corporation of Gaithersburg;

(L) Montgomery County Election District 9, that part of Precinct 15 that is generally west of the municipal boundary of the municipal corporation of Gaithersburg;

(M) Montgomery County Election District 9, that part of Precinct 20 that is within the municipal boundary of the municipal corporation of Gaithersburg; and

(N) Montgomery County Election District 13, that part of Precinct 26 that is generally north and west of a line that runs along the center of Cedar Lane in a generally easterly direction from the boundary of Precinct 38 of Election District 13 to Summit Avenue, thence in a

northerly direction along the center of Summit Avenue to the existing boundary between Precincts 26 and 40 of Election District 13.

(18) Legislative District 18 consists of:

(A) Montgomery County Election District 7, Precincts 1, 2, 5, 6, 16, 21, and 32;

(B) Montgomery County Election District 13, Precincts 3, 7, 16, 17, 24, 25, 27 through 32, inclusive, 34, 36, 39, 40, 44, 53, 58, 59, and 61;

(C) Montgomery County Election District 13, that part of Precinct 14 that is generally north and west of a line that runs along the center of Alton Parkway from Georgia Avenue to Dale Drive, thence in a southeasterly direction along the center of Dale Drive to Colesville Road;

(D) Montgomery County Election District 13, that part of Precinct 26 that is generally east of a line that runs along

the center of Cedar Lane in a generally easterly direction from the boundary of Precinct 38 of Election District 13 to Summit Avenue, thence in a northerly direction along the center of Summit Avenue to the existing boundary between Precincts 26 and 40 of Election District 13; and

(E) Montgomery County Election District 13, that part of Precinct 49 that is generally west and south of a line that runs along the center of Martin Avenue in a northerly direction to Henderson Avenue, thence in an easterly direction along the center of Henderson Avenue to Bernard Drive, thence in a northerly direction along the center of Bernard Drive to Georgian Woods Place, thence along the center of Georgian Woods Place to the intersection of Georgian Woods Place and Georgia Avenue.

(19) Legislative District 19 consists of:

(A) Montgomery County Election Dis-

trict 4, Precinct 19;

(B) Montgomery County Election District 4, that part of Precinct 1 that is east of a line that runs along the center of Rock Creek;

(C) Montgomery County Election District 8, Precincts 3 and 4;

(D) Montgomery County Election District 8, that part of a Precinct 6 that is generally west and south of a line running in a northwesterly direction along the center of Norwood Road from the southern Precinct boundary to the intersection of Dr. Bird Road, thence continuing in a northwesterly direction along the center of Dr. Bird Road to Maryland Route 108;

(E) Montgomery County Election District 9, Precincts 4 and 14;

(F) Montgomery County Election District 9, that part of Precinct 10 that is not within the municipal boundary of the municipal corporation of Gaithersburg;

(G) Montgomery County Election District 13, Precincts 1, 2, 11, 19, 20, 33, 35, 37, 42, 43, 45, 46, 48, 51, 52, 54 through 57, inclusive, and 60; and

(H) Montgomery County Election District 13, that part of Precinct 49 that is generally east of a line that runs along the center of Martin Avenue in a northerly direction to Henderson Avenue, thence in an easterly direction along the center of Henderson Avenue to Bernard Drive, thence in a northerly direction along the center of Bernard Drive to Georgian Woods Place, thence along the center of Georgian Woods Place to the intersection of Georgian Woods Place and Georgia Avenue.

(20) Legislative District 20 consists of:

(A) Montgomery County Election District 5, Precincts 3 through 7, inclusive, 9 through 14, inclusive, and 16;

(B) Montgomery County Election Dis-

trict 5, that part of Precinct 1 that is generally south of a line running along the center of Good Hope Road from New Hampshire Avenue a distance of 2,100 feet to an unnamed stream which is the western fork of another unnamed stream (both of which are generally known as the Good Hope Branch Tributary to the Paint Branch), thence in a southeasterly direction along the center of the western fork to the second unnamed stream, and thence along the center of the second unnamed stream to Paint Branch;

(C) Montgomery County Election District 13, Precincts 4, 5, 6, 8, 9, 10, 12, 13, 14, 18, 21, 22, 23, 41, 47, and 50; and

(D) Montgomery County Election District 13, that part of Precinct 14 that is generally south and east of a line that runs along the center of Alton Parkway from Georgia Avenue to Dale Drive, thence in an easterly direction along the center of Dale Drive to Colesville Road.

(portions of Resolution describing boundaries of legislative districts outside of Montgomery County omitted).

47A.

For purposes of elections, the provisions of this subtitle shall be applicable to elections for members of the General Assembly beginning with the Primary and General Elections of 1982 and, for purposes of representation, shall be applicable beginning with the second Wednesday of January, 1983.

47B.

All provisions of this Article, and all other laws or parts of laws, public general or public local, inconsistent with the provisions of this subtitle, are repealed to the extent of any such inconsistency.

47C.

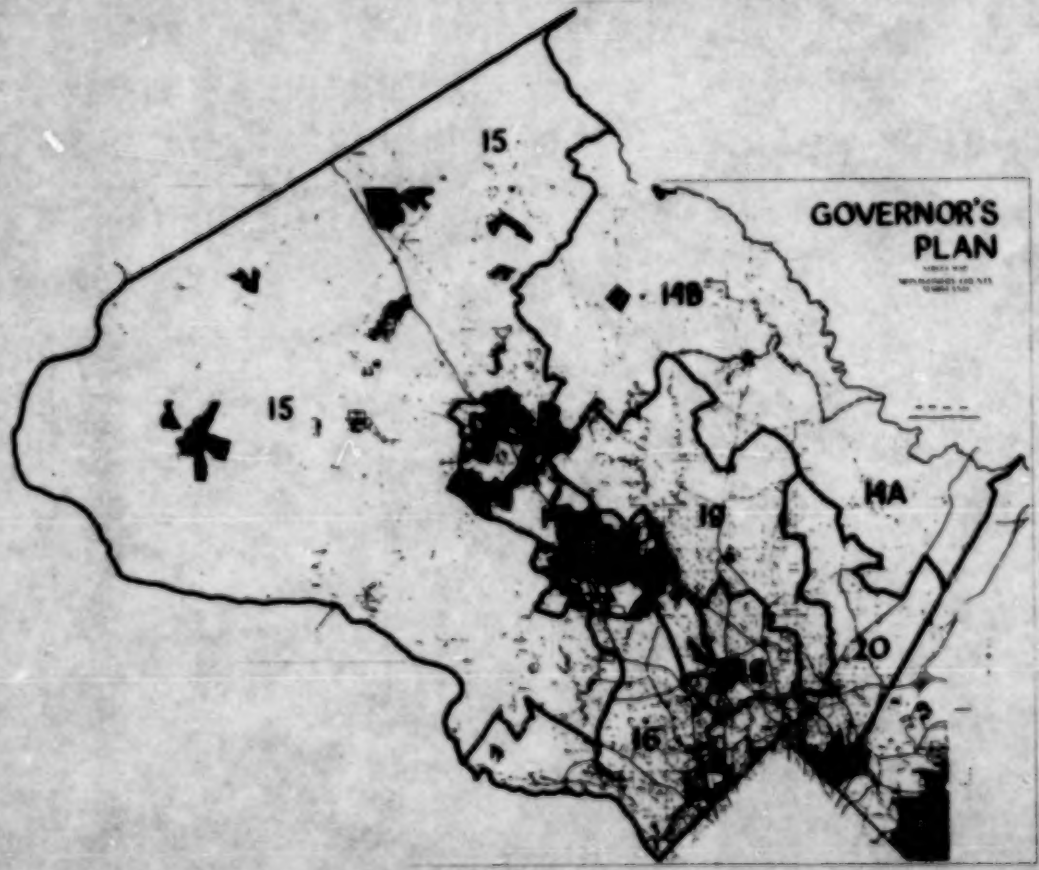
If any part of this subtitle, includ-

ing any section or subsection or portion of it, shall be held to be unconstitutional or invalid for any reason, the unconstitutionality or invalidity may not affect the remaining parts of this subtitle. It is the intention that the remaining parts of this subtitle would have been enacted into law if that unconstitutionality or invalidity had been known. To this end, all parts of this subtitle are declared to be severable.

SECTION 3. AND BE IT FURTHER RESOLVED, That this Joint Resolution is intended to remove ambiguities from, and implement the underlying intent of, the plan for legislative districting presented by the Governor pursuant to Article III, Section 5, of the Constitution of Maryland and to make an internal change within a legislative district to improve, in a Delegate district, access originally

inadvertently limited by an unbridged body of water.

SECTION 4. AND BE IT FURTHER RESOLVED, That this Joint Resolution shall not be construed to preclude the adoption of any other plan setting forth the boundaries for legislative districts pursuant to the provisions of the fourth and fifth sentences of Article III, Section 5, of the Constitution of Maryland and shall be effective as a plan within the meaning of those provisions only if no other plan is adopted by the General Assembly pursuant to those provisions by the 45th day of the 1982 regular Session.


GOVERNOR'S
PLAN
15
15
14B
14A
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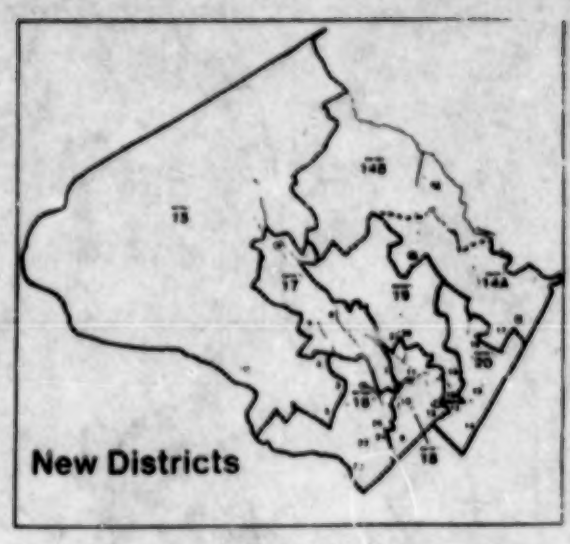
16

The small numbers on the New Districts map denote the 25 incumbents' residences:



New Districts

Petitioner's Exhibit #13

POPULATION OF MONTGOMERY COUNTY AND
RESIDENCY OF INCUMBENT LEGISLATORS
NORTH AND SOUTH OF RANDOLPH ROAD

Randolph Road is (aside from the Capital Beltway) the principal cross County highway in Montgomery County.

Known as Cherry Hill Road for a short distance on the eastern portion near the Prince George's County line and as Montrose Road for about 2.4 miles west of Rockville Pike, it crosses the County for a total distance of approximately 14 miles.

The eastern portion is a well travelled two-lane road running about 3.9 miles from the Prince George's County line to New Hampshire Avenue and providing access via Calverton Boulevard to Interstate 95 at its Calverton Beltsville interchange.

From New Hampshire Avenue to Georgia

Avenue (2.9 miles), it is a six-lane divided highway. From Georgia Avenue to its western terminus at Seven Locks Road (7.2 miles), it is a four-lane highway (divided for 2.6 miles from Georgia Avenue to just west of Viers Mill Road). Near its western end, it provides access with Interstate 270 by an interchange and terminates a short distance beyond that interchange at Seven Locks Road in Western Montgomery County.

As virtually the only cross County Road (aside from the Capital Beltway which is located farther south generally running through areas that are considered relatively older parts of Montgomery County), it provides a natural boundary between the older and new developments of Montgomery County.

Its significance as a cross County highway and a natural boundary between the northern and southern parts of the County

is attested to by the fact that the Montgomery County Department of Transportation uses it as the dividing line on the two Traffic Volume Maps it prepares for highways in the County.

Randolph Road as a natural boundary is also exemplified by the fact that almost for its entire length, it is the boundary line between 22 precincts in Montgomery County. Randolph Road goes through an additional three precincts. These three precincts (13-25, 13-36 and 13-61) are ones in which the residential areas on both sides are part of the same residential development and have very close community ties and a division would have left small portions of the precincts subdivided by parks or major highways.

A comparison of the proportion of the population and the residences of the incumbent legislators north and south of Randolph Road (and an area extending

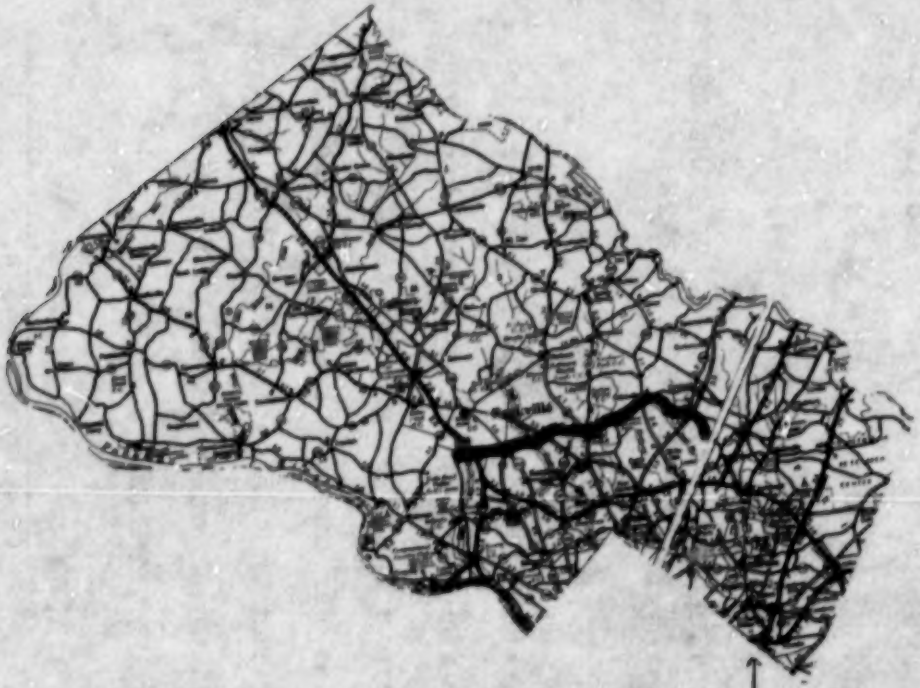
westerly, from its terminus in western Montgomery County) as compared to the entire area of the six legislative districts located wholly within Montgomery County (thus excluding District 14A) under the Governor's Plan is as follows:

	Population	Senators	Delegates
North Area	43%	0 (0%)	5 (27%)
South Area	57%	6 (100%)	13 (73%)

The area north of Randolph Road contains most of the areas of population growth during the 1970's and most of the areas of future projected population growth.

A map showing the general route of Randolph Road across Montgomery County is attached as Appendix I.

Montgomery County showing location of Randolph Road



IN THE COURT OF APPEALS OF MARYLAND

In The Matter Of Legislative Districting	:	September Term
C. LAWRENCE WISER	:	1982
Petitioner	:	
vs.	:	Miscellaneous
HARRY R. HUGHES,	:	No. 2
Respondent	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that C. Lawrence Wiser, the petitioner in the above captioned case, hereby appeals to the Supreme Court of the United States from the final Per Curiam order dismissing the Petition entered in this action on June 4, 1982.

This action is taken pursuant to 28 U.S.C. §1257(2).

C. Lawrence Wiser
Petitioner
Suite 400, 10605 Concord St.
Kensington, Maryland 20895
301-949-7870

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, this 30th day of August, 1982, to W. Shepherdson Abell, Thomas F. Hogan, and Marianne K. Renjilian of Furey, Doolan, Abell & Hogan, 8401 Connecticut Avenue, Chevy Chase, Maryland 20815; Stephen H. Sachs, Diana G. Motz, Robert A. Zarnoch, Mary N. Humphries, and Linda H. Lamone of the Office of the Attorney General at 1400 One South Calvert Building, Baltimore, Maryland 21202; Stanley D. Abrams, Attorney for Bruce Goldensohn at Levitan, Ezrin, West, Weinstein & Kerxton, 7315 Wisconsin Avenue, Suite 760 North, Bethesda, Maryland 20814; and Roger W. Titus and Sondra Harans Block, Attorneys for the City of Rockville, P.O. Box 1906, Rockville, Maryland 20850.

C. Lawrence Wiser

Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

STEPHEN H. SACHS,
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Seven North Calvert Street,
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Counsel for Appellee
Harry Hughes.

QUESTION PRESENTED

Is a reapportionment plan which creates legislative districts conceded to be (1) substantially equal in population and (2) in no way racially discriminatory, invidiously discriminatory because it minimizes election contests among incumbents in some legislative districts?

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No. 82-347

IN THE
SUPREME COURT OF THE UNITED STATES

In The Matter of Legislative
Districting of the State

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES,

Appellee

MOTION TO DISMISS OR AFFIRM

The State, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the question presented is too insubstantial to merit further argument.

OPINIONS BELOW

The unreported Per Curiam Order of the Court of Appeals of Maryland dated June 4, 1982, and the unreported Report of the Special Master appointed by the Court of Appeals of Maryland dated May 12, 1982, is printed in the Appendix of Wiser's jurisdictional statement at A-1 to A-4 and A-5 to A-48, respectively. As this is an original proceeding in the Court of Appeals of Maryland, there are no further opinions or orders.

JURSIDICTION

Wiser erroneously asserts that the jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). It is the position of the State that jurisdiction only arises pursuant to 28 U.S.C. §1257(3) and that review is by way of certiorari. Therefore, the State requests this Court to treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103 and to treat this Motion as a Brief in Opposition.

LAW INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed in Appendix A of this Motion. Sections 1 through 5 of Article III of the Maryland Constitution are printed in Appendix A of this Motion. The portions of the Legislative District Plan for the State of Maryland directly at issue here are printed in the Appendix of Wiser's Jurisdictional Statement at A-49 to A-74.

STATEMENT OF THE CASE

Under the terms of Article III, Section 1 of the Constitution of Maryland, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryand. The upper house, or Senate, has a membership of forty-seven; the lower house, or House of Delegates, has one hundred forty-one members. Md. Const., Art. III, Sec. 2. Section 3 of Article III provides that the State shall be divided into forty-seven legislative districts, with one Senator and three Delegates elected from each district.

The current legislative districting plan traces its origins to the plan proposed by the Governor's Advisory Committee on Reapportionment. The Committee was charged with receiving public comment in order to better formulate a State legislative reapportionment plan and a congressional redistricting plan for the Governor.

The Advisory Committee held numerous public hearings between May 17, 1981 and December 8, 1981 in formulating its redistricting recommendations; 213 persons testified at these hearings. On December 8, 1981, the Committee made its recommendations to the Governor, who subsequently held two public hearings: one on December 21, 1981, at which 24 witnesses spoke, and one on December 23, 1981, at which 46 witnesses testified. After considering the testimony, the Governor adopted the majority of the Committee's recommendations. J.S. App. at 5-8.

On the first day of the 1982 Session of the General Assembly, pursuant to Article III, Section 5 of the Maryland Constitution, the Governor's Plan was introduced as House Joint Resolution 15 and Senate Joint Resolution 10. A slightly modified version of this

Plan, including technical corrections, was introduced as House Joint Resolution 32. Lengthy hearings were held before the Senate Constitutional and Public Law Committee and the House Constitutional and Administrative Law Committee. After the General Assembly approved House Joint Resolution 32 (hereinafter the Legislative Plan) on February 26, 1982, it became law in accordance with Article III, Section 5 of the Constitution of Maryland.

Responding to original proceedings instituted by Wiser and other registered voters, pursuant to Section 5 of Article III of the Constitution of Maryland, the Maryland Court of Appeals directed that hearings be conducted by a retired judge of the Court of Special Appeals, sitting as a special master.

Wiser alleged that Legislative Districts 14A and 15 through 20 violated the Maryland constitutional requirement that districts be compact and give due regard to natural boundaries and the boundaries of political subdivisions. It was secondarily asserted that consideration of incumbency interests constituted political gerrymandering in viol-

ation of the Fourteenth Amendment.[1] To cure these alleged defects, Wiser proposed a plan which would have altered the configurations of every district within Montgomery County. J.S. App. at 33-39.

The Special Master held an evidentiary hearing on April 14, 1982, and heard oral argument on April 28, 1982. On May 12, 1982, the Special Master issued his report and findings, rejecting, inter alia, Wiser's challenge and suggested plan. Subsequently, on June 1, 1982, the Court of Appeals of Maryland heard oral argument in support of or in opposition to the Report submitted by the Special Master. These proceedings before the Court of Appeals culminated in the per curiam order of June 4, 1922, which rejected all challenges to the Legislative Plan.

The primary election of September 14, 1982 was conducted in accordance with the per curiam order of June 4, 1982 and the Legislative Plan as adopted by the General Assembly of Maryland.

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[1] The federal claim was not extensively briefed or argued before the Special Master or the Court of Appeals. It occupied merely one of 15 paragraphs of the Petition and only approximately six of the 87 pages of various memoranda filed by Wiser.

ARGUMENT

A Legislative Reapportionment Plan Which Creates Legislative Districts Which Are Admitted To Be Both Substantially Equal In Population And In No Way Racially Discriminatory Is Not Unconstitutional Simply Because It Also Minimizes Election Contests Among Incumbents In Some Legislative Districts.

It should be noted at the outset that review of this case is appropriate only by means of writ of certiorari pursuant to 28 U.S.C. §1257(3), rather than by appeal pursuant to 28 U.S.C. §1257(2). Appellant Wiser has not, as will be demonstrated within, met the minimal threshold necessary to establish a right to appeal, because he has failed to identify a specific religious, ethnic, economic or political group which has been disenfranchised by the Legislative Plan. Absent such an identifiable group, there is no basis for a claim of invidious discrimination under the Equal Protection clause of the Fourteenth Amendment, and thus no denial of a federal right. Moreover, Appellant has challenged the constitutionality of one small portion of the Legislative Plan only, and thus a finding of a federal constitutional violation in that portion would not result in invalidation of the Plan in its entirety.

Despite Wiser's claim that the districting in question is violative of his right to equal protection of the law, he concedes, as he must, that the Legislative Plan affords each district substantial equality of population and is in no way racially discriminatory. He mistakenly urges an ethereal constitutional claim, that minimization of election contests among present incumbents represents invidious discrimination.[2] However,

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[2] Wiser also bases an equal protection claim on his theory that residents of the "northern" portion of Montgomery County are somehow disenfranchised because most of the incumbent legislators live in the "southern" part of the county. However, he has produced no evidence that the configurations of the legislative districts in Montgomery County were the result of discriminatory intent or that such configurations have any discriminatory effect. J.S. App. at 35 and 37; Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). Past failure at the polls, let alone speculative future failure, does not establish discriminatory effect, much less discriminatory purpose. City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion); White v. Regester, 412 U.S. 755, 765 (1973). Moreover, it is well settled that an interest or other group has no constitutional "entitlement" to elect representatives in proportion to its population. City of Mobile v. Bolden, supra. See also, Whitcomb v. Chavis, 403 U.S. 124, 156-157 (1971) (Where this Court warned that a contrary approach "would spawn endless litigation.") In addition, it is questionable whether Wiser has raised a justiciable claim. Wendler v. Stone, 350 F.Supp. 838, 840 (S.D. Fla. 1972); see also, Whitcomb v. Chavis, supra, 403 U.S. at 156. Finally, notwithstanding the particular locality of a legislator's residence, in fact the legislators of each district are elected at large, represent and are responsible to the entire district and all of its residents. To conclude that a Delegate or Senator is concerned only with the interests of (cont.)

he recognizes that this Court has never found the drawing of district lines so as to minimize incumbency battles to be a violation of the equal protection clause. J.S. App. at 13.

Upon compliance with express constitutional criteria, districting that minimizes contests among incumbents or maintains the relationship between representatives and their constituencies is not political gerrymandering. Indeed, such considerations have been judicially approved given the intrinsically political nature of reapportionment as a legislative process. White v. Weiser, 412 U.S. 783, 791 (1973). Thus, an otherwise acceptable plan which takes into account political factors is not constitutionally infirm. As noted by this Court in Burns v. Richardson, 384 U.S. 73, 89, n.16 (1966), a case involving state legislative apportionment:

> "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."

In White v. Weiser, a case concerning congressional reapportionment, this Court

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the citizens in that area where he or she resides is to ignore political reality.

reiterated this philosophy. Upholding the lower court's invalidation of a legislative plan with unacceptable population variances, this Court stated that the variances were not necessary to achieve the asserted state goal of promoting "constituency - representative relations." This Court acknowledged the policy to be one "frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." Id. at 791. The Court endorsed the policy, stating "We do not disparage this interest," and quoted Burns v. Richardson, supra. Id. at 791, 797. Also significant in White v. Weiser is this Court's invalidation of the lower court's order implementing a districting plan which ignored the State's policy and used, instead, population considerations as the sole criterion. Id. at 797.

This Court has consistently recognized the political nature of redistricting, which explains its approval of the inclusion of political criteria in the reapportionment process.

> "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. . . . Here those decisions were made

> by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts." White v. Weiser, supra, 412 U.S. at 796.

See also Gaffney v. Cummings, 412 U.S. 735, 753-754 (1973) ("[t]he reality is that districting inevitably has and is intended to have substantial political consequences."); Upham v. Seamon, _____ U.S. _____, 102 S.Ct. 1518 (1982).

No evidence in the record supports Wiser's contention. J.S. App. at 37. Rather, the record reflects numerous rational state policies and reasonable state interests which justify and explain the configurations of the Montgomery County Districts. Indeed, the Legislative Plan was considered and approved by the Advisory Committee, the Governor and the General Assembly after numerous public hearings. The Montgomery County Delegation was involved in the process of developing the districts for the county (as were other delegations in other counties).[3]

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[3] Appellant alleges that the involvement of the Montgomery County legislative delegation in developing prospective districts for the County is somehow improper. However, it should be remembered that districting is a political-legislative function. The Governor's consideration of the (cont.)

The Montgomery County legislative districts were built upon the external boundaries of Montgomery County (the boundary of the District of Columbia, the Potomac River and the Prince George's County line) and the lines of existing legislative districts. These are rational and permissive starting points. See, e.g., Wells v. White, 623 S.W.2d 187, 189 (Ark. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 1753 (1982); Cosner v. Dalton, 522 F.Supp. 350, 361 (E.D. Va. 1981). Furthermore, it is clear from the evidence in the record that constitutionally mandatory consideration was given to various natural boundaries and political subdivisions, to the accommodation of many communities of interest, and to the historic pattern of a shared district with Howard County. Inevitably, practical considerations of topography, means of transportation and

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suggestions of local legislators in drafting a plan may well be advisable since the Legislature has the right to devise its own plan if it is dissatisfied with that of the Governor. Md. Const. Art. III, Sec. 5. The process of creating a legislative plan cannot be accomplished in a vacuum — the knowledge and experience of the elected representatives from the various diverse areas of the State is vitally important. Reapportionment is uniquely a political process, for who is better qualified to speak for the needs and desires of the citizens than their representatives elected to the body with ultimate responsibility for devising the plan? Certainly, a self-appointed spokesman — an individual representing no one but himself — is not in a superior position.

lines of communication were taken into account.

In sum, it is clear that the protection of incumbents in drawing district lines is a justifiable and permissible legislative concern.[4] The Legislative Plan is not made constitutionally vulnerable by the consideration of political factors. Although problems may arise from the use of political criteria when significant population deviations are created or when the voting strength of racial, ethnic, or political groups is minimized, no such infirmities exist in the State's plan.

CONCLUSION

Accordingly, the State respectfully submits that the question upon which this cause

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[4] Indeed, as the Special Master noted, "a serious question exists whether [a] challenge to a legislative districting plan upon the mere ground that it tends to minimize contests among present incumbents is justiciable." J.S. App. at 35-36. Thus, in WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (S.D. N.Y. 1965), aff'd per curiam, 382 U.S. 4 (1966), this Court upheld a lower court decision that political gerrymandering may not be subject to constitutional attack. And in Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1972), this Court refused to review a U.S. Court of Appeals decision holding non-justiciable a complaint of political gerrymandering. According to these authorities, Wiser has no cause of action under the Fourteenth Amendment.

depends is so unsubstantial as not to need further argument, and respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the Court of Appeals of Maryland.

Respectfully submitted,

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Attorney General of Maryland

Diana G. Motz
Robert A. Zarnoch
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APPENDIX A

Pertinent Constitutional Provisions

Constitution of the United States

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland

Article III.

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Delegates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into legislative Districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-menber delegate district and one (1) multimember delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and the Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennnial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after

the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

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No. 82-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF LEGISLATIVE DISTRICTING
OF THE STATE OF MARYLAND

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES, *et al.*,

Appellees.

On Appeal From The Court Of Appeals Of Maryland

MOTION TO DISMISS OR AFFIRM

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No. 82-347

IN THE

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Apellees

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Senators Victor L. Crawford, Howard A. Denis, Sidney Kramer, Lawrence Levitan, Margaret C. Schweinhaut, and S. Frank Shore, and Delegates Stewart Bainum, Jr., Mary Boergers, Joel Chasnoff, Jennie M. Forehand, Idamae Garrott, Marilyn

Goldwater, Sheila Ellis Hixson, Jerry H. Hyatt, Nancy K. Kopp, Helen L. Koss, Lucille Maurer, Constance A. Morella, Joseph E. Owens, Donald B. Robertson, Ida G. Ruben, Patricia R. Sher and Judith C. Toth, members of the Montgomery County Legislative Delegation to the General Assembly of Maryland[1] (hereinafter collectively referred to as the "Montgomery County Legislative Delegation"), by and through their attorneys, W. Shepherdson Abell and Marianne K. Renjilian, move this Court pursuant to Rule 16 for an Order dismissing the appeal or, in the alternative, summarily affirming the Per Curiam Order appealed from, which was entered by the Court of Appeals of Maryland on June 4, 1982. In the

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[1] Two members of the Delegation did not participate in the proceedings below, and do not join in this Motion.

alternative, should the Court treat Appellant Wiser's appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, the Delegation prays that the Court treat this Motion as a Brief in Opposition filed pursuant to Rule 22.1, and deny the petition.

STATEMENT OF FACTS

This case involves the 1982 decennial state legislative redistricting of the State of Maryland, and in particular, the redistricting of Montgomery County, Maryland. Appellant Wiser filed one of ten petitions seeking review by the Court of Appeals of Maryland, in its original jurisdiction, of the redistricting plan proposed by Governor Harry R. Hughes and adopted by the bicameral Maryland General Assembly as H.J.R. 32, Acts of 1982. Article III, Section 5 of the Maryland

Constitution[2] provides that a plan so adopted "shall become law".

Two of the ten petitions filed with the Court of Appeals concerned the redistricting of Montgomery County. Appellant Wiser's petition was one of those two. The other was filed by Bruce A. Goldensohn, the Mayor of Gaithersburg, Maryland. The two petitions were consolidated. The Delegation's motion for leave to intervene as parties respondents with respect to the two consolidated petitions was granted by the Court of Appeals of Maryland on April 2, 1982.

A Special Master was appointed by the Court to hold hearings and make recommendations to it concerning disposition of the various petitions. After hearing, the Special Master issued a

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[2] The text of Article III, Section 5 is set out in the Appendix to this Motion at pages 1-3.

Report which is reproduced in part in Appellant's Appendix to Jurisdictional Statement at pages 5 to 48. The Special Master recommended, inter alia, that both petitions relating to Montgomery County be dismissed.

Appellant's exceptions to the Report were overruled, and the legislative districts were ordered to be as established in and by H.J.R. 32, by the Per Curiam Order entered by the Court of Appeals of Maryland on June 4, 1982, which is reproduced in Appellant's Appendix to Jurisdictional Statement (hereinafter cited as "App.") at pages 1 through 4. Petitioner Goldensohn's exceptions were likewise overruled. No appeal has been taken from the Order as it affected Petitioner Goldensohn's exceptions.

The reasons for the Court of Appeals decision are not stated in the Per Curiam Order; it states that those reasons are to be set forth in an opinion later to be

filed (App. at 3). To the date of the drafting of this Motion, no such opinion has been filed.

Insofar as any issues arising under the United States Constitution are concerned, the Per Curiam Order states only that "the petitions. . . failed to establish any violations of the federal constitution . . . ." (App. at 3).

A number of issues were raised below in connection with Appellant's petition. Most of those issues were predicated on alleged violations of Article III, Section 4 of the Constitution of Maryland, the text of which is set out in the Special Master's Report. (App. at 19). Appellant's allegations of violation of the Fourteenth Amendment were raised as stated in his Jurisdictional Statement, at pages 5 and 6. The Supplemental Memorandum filed April 14, 1982 and the pertinent portion of the Memorandum in Opposition to Report of the Special Master

filed May 26, 1982, to which Appellant refers, in his Jurisdictional Statement, are included in the Appendix to this Motion at pages 3-9 and 10-15, respectively.

The Special Master's Report deals with Appellant's equal protection arguments only in terms of the allegations relating to minimization of contests among incumbents. See App. at 35-38.

Insofar as Montgomery County is concerned, there were, in the Court below, no allegations of any racial, partisan, ethnic, religious, or economic discrimination arising as a result of the districting plan. It was undisputed that the districts, from each of which one Senator and three Delegates are to be elected, each included the residences of one incumbent Senator and three incumbent

Delegates.[3] It was also undisputed that the present incumbents include both Republicans and Democrats. The locations of the incumbents' residences vis-a-vis Randolph Road[4] were likewise undisputed; however, the significance of those locations was disputed, with the Delegation taking the position that they were irrelevant. See paragraphs 6 through

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[3] Since the Per Curiam Order appealed from was entered, the candidates' filing deadlines for the September 14, 1982 primary elections and the November 9, 1982 general election have come and gone. Two of the incumbent legislators--one Delegate and one Senator--are not seeking reelection; one incumbent Delegate is seeking election as a Senator. Appellant is not seeking election, despite his concession below that he would have liked to do so. See App. at 46, n.13.

[4] One of the highways which run roughly east-to-west through a portion (though not all) of Montgomery County, Maryland is Randolph Road. Appellant has in effect contended that, because all the incumbents live south of Randolph Road, a districting plan which avoids contests among those incumbents is inherently violative of the Equal Protection Clause.

11 of the Supplemental Affidavit of Helen L. Koss, reproduced in the Appendix to this Motion at pages 27-34. That Affidavit was submitted simultaneously with the Delegation's Reply Memorandum, which is reproduced in the Appendix to this Motion at pages 15-27, for the sake of completeness.

ARGUMENT

The Montgomery County Legislative Delegation respectfully submits that the appeal should be dismissed, or in the alternative that the Per Curiam Order appealed from should be summarily affirmed, for the following reasons.

I. PRELIMINARY OBSERVATIONS - THE QUESTIONS SOUGHT TO BE REVIEWED

Appellant has stated the question presented by his appeal as follows:

> "Whether gerrymandering of districts drawn for election of members of a state legislature is a denial of equal protection under the Fourteenth Amendment to

> the United States Constitution to those against whom the gerrymander is directed."

The Delegation submits that this statement of the questions involved here is over-broad and unclear.[5] Appellant does not define the word "gerrymandering", which is often used to describe any redistricting plan which the one using the word deems unsatisfactory. The term is frequently the epithet--and the last refuge--of disappointed office seekers.

Despite the lack of specific definition, as the Delegation understands Appellant's Jurisdictional Statement he appears to be discomfited primarily by the following matters:

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[5] If this appeal is treated as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, the Delegation would respectfully draw the Court's attention to Rule 21.5 of the Rules of this Court, which requires "accuracy, brevity and clearness" in such petitions, and would submit that the petition should be denied.

a. the fact that each district is somewhat irregular in shape and contains the residences of one incumbent for each legislative seat to be filled by election; and

b. the fact that the districts extend both north and south of Randolph Road when most of the incumbent legislators (whose reelection Appellant deems a virtual certainty) live south of Randolph Road, and when (according to Appellant's allegations) most of the population growth in the County since the last redistricting has occurred north of Randolph Road.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS NOT BEEN EXPRESSLY PASSED UPON, AND THE PER CURIAM ORDER MAY REST ON ADEQUATE NON-FEDERAL BASES

As noted in the Statement of Facts, supra, the Court of Appeals of Maryland has not, as of the date of drafting of this Motion, filed an opinion stating its

reasons for overruling Appellant Wiser's exceptions to the Report of the Special Master. The Per Curiam Order appealed from states, in pertinent part, only that the petitions failed to establish any violation of the federal Constitution. (App. at 3).

Additionally, it should be noted that the Special Master's Report dealt with Appellant's allegations of violations of the United States Constitution only insofar as they related to minimization of contests among incumbents. (App. at 35-38). Neither the Special Master nor the Court of Appeals has expressly passed upon Appellant's contentions relating to the location of incumbents' residences relative to "growth areas" in Montgomery County or relative to Randolph Road. It is not clear from the Per Curiam Order or from the Special Master's Report whether those contentions were believed to be constitutionally insignificant per se, or

whether, perhaps, there was found to be a failure by Appellant to present sufficient evidence or to carry his burden of proof on those matters. In any event, the Delegation submits that the appeal should be dismissed insofar as those matters are concerned, on the ground that they were not expressly passed upon below.

To the extent the Jurisdictional Statement may be deemed to raise any issue related to the constitutional propriety of the state legislature's involvement in the redistricting process, the Delegation submits that the appeal should be dismissed because no such issue was raised or passed upon in the Court below at any time.[6]

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[6] In any event, the Delegation submits that Maryland's constitutionally mandated reapportionment procedures set out in Article III, Section 5 of the Constitution of Maryland (Appendix to this Motion at pages 1-3) are entirely proper, and no substantial federal question requiring review could be raised in connection with them.

III. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; IT IS MANIFEST THAT THE QUESTIONS ON WHICH DECISION OF THIS CAUSE RESTS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

The Montgomery County Legislative Delegation respectfully submits that the instant appeal should be dismissed on the merits or, in the alternative, that the Per Curiam Order entered June 4, 1982 should be summarily affirmed, because Appellant has failed to present a substantial federal question for review.

A. Irregularities of District Shape and Minimization of Contests Among Incumbent Legislators Do Not Per Se Establish Invidious Discrimination

The Delegation respectfully submits that neither Appellant's contentions relating to the shapes of the Montgomery County districts, nor his contentions relating to minimization of contests among incumbents, nor both in combination,

without more, present a substantial federal question for review.

Appellant, in his Jurisdictional Statement at pages 10 and 11, avers that the district boundaries in Montgomery County are "bizarre, remote and meandering" and that the districts "have legs that drop down." It is undisputed that the shapes of the districts are somewhat irregular.[7] See App. at 75, 76. In the proceedings below, the state constitutional requirement that districts be "compact in form" occupied considerable time and attention. See, e.g. App. at 20-32, 38-42. It seems clear from the authorities, however, that there is no federal requirement that state legislative

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[7] The reasons for the districts having being drawn as they were were presented at length to the Special Master and to the Court of Appeals of Maryland; those reasons included many factors other than the location of incumbents' residences.

districts be compact in form. See, e.g., Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973). And the Maryland Court of Appeals has implicitly found that the state compactness requirement was met by H.J.R. 32. (App. at 3).

It was undisputed in the Court below that the challenged legislative districts in Montgomery County contained the residences of one incumbent--and no more--for each legislative seat to be filled by election. While the Court of Appeals has yet to express itself on this matter, the Special Master stated in his Report:

> "No evidence is to be found in the record that 'districting for incumbents' was the product of any plot, plan or scheme to diminish, dilute or cancel out the voting strength of any racial or political group. Neither is there any evidence that such is its effect.
>
> "There is no record evidence that the Legislative Plan conferred any special

handicap or special benefit to any incumbent other than may have been earned in the performance of duty during his term of office." App. at 37.

This Court has clearly stated that "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." Burns v. Richardson, 384 U.S. 73, 89, n.16, (1966). See also, White v. Weiser, 412 U.S. 783, 791, (1973). It is clear from the Special Master's Report that he found that nothing invidious, indeed nothing more than minimization of contests among incumbents itself, was shown in this case. The additional factor of irregular district shapes which meet a state compactness requirement does not, and cannot in the Delegation's view, transmute the well-settled law on this point into a substantial federal question requiring

review by this Court.

Accordingly, the Delegation submits that this appeal presents no substantial federal question in this regard, and that the law is so clear that it is manifest that there is no need for further argument as to this point. The Delegation thus respectfully requests that the appeal be dismissed or, in the alternative, that the Per Curiam Order be summarily affirmed.

B. Appellant's Contentions Concerning Representation of "Growth Areas" Fail to Present A Substantial Federal Question For Review

As noted above, neither the Court of Appeals nor the Special Master has to date issued a written opinion which directly addresses Appellant's contentions relating to Randolph Road and the alleged "growth areas" to the north of it. The Delegation respectfully submits that even had there been a ruling on these points, no substantial federal question requiring

further argument would be presented by this appeal.

Appellant has never cited, and the Delegation has been unable to discover, any decided case or other authority for the proposition that a federal equal protection claim--or any other justiciable claim--may be founded upon alleged discrimination between "growth areas" and "non-growth areas" of a County. In any event, the Special Master properly found that there was no evidence of invidious discrimination in this case. See App. at 37.[8]/

The essence of Appellant's dispute with the Court of Appeals' decision in this case regarding "growth areas" is

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[8]/ The "single exception" found by the Special Master did not relate to Montgomery County, and the Court of Appeals sustained the State's exceptions to the portion of the Special Master's Report which dealt with that "single exception". See App. at 3.

probably best gleaned from pages 21 through 24 of his Jurisdictional Statement. He says essentially two things, both of which the Montgomery County Legislative Delegation believes to be completely unsupported by law, fact, logic or sound constitutional philosophy: (1) that the purpose of reapportionment is to give geographical areas which have experienced population growth--as areas--"increased representation"; and (2) implicitly, that a legislator who lives in the southern part of Montgomery County cannot fairly represent constituents who live north of Randolph Road, that is, that "fair representation" requires that "up-County" residents be represented proportionately in the legislature and be represented by one of their own number.

The Delegation submits that it is clear that no substantial federal question requiring further argument is presented by

this appeal as to these matters. Even apart from the obstacles to review by this Court which arise because the facts of these matters were disputed[9] and because there has to date been no express ruling on them, the Delegation respectfully submits that the appeal should be dismissed on the merits as a matter of law.

It has clearly been stated by this Court that "people, not trees" are entitled to representation. Reynolds v. Sims, 377 U.S. 533, 562 (1964). Similarly, "areas", even "growth areas", are not entitled to representation; people are. In fact, the entire thrust of Baker v. Carr, 369 U.S. 186 (1962), and its

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[9] See page 8 of this Motion, supra, and the Supplemental Affidavit of Helen Koss (Appendix to this Motion at 27-34). As to disputes related to the existence and location of various "communities of interest" in Montgomery County, see the Special Master's Report (Appendix to this Motion at 37-38), and n.11, infra.

progeny was that, notwithstanding traditional representation of areas as areas, the Fourteenth Amendment requires equality of treatment for each prospective voter.

There is no claim in this case, nor could there be, that residents of any part of Montgomery County have been deprived of an equal vote in electing their legislators, or deprived of access to the political system. There was no dispute that the redistricting plan established by H.J.R. 32 meets federal constitutional requirements for population equality among districts, and the Special Master so found. (App. at 42). There was no evidence, nor could there be, that the value of any resident's vote is in any way debased by the fact that the redistricting plan permits all incumbents to run for re-election without opposing one another; every resident may cast an equally weighted vote for incumbents or for any

others who choose to run.[10] The Delegation submits that no substantial federal question is raised by Appellant's contentions relating to the purpose of reapportionment and the representation of "growth areas" *per se*.

Further, even had it been clearly established by Appellant--which it was not--that "up-County" residents were an identifiable political group distinct from "down-County" residents, no substantial federal question requiring further argument would be raised by Appellant's tacit contention that this group is entitled to proportional representation by

---

[10] Appellant has proceeded as if the fact that all incumbents reside south of Randolph Road means that the redistricting plan has imposed some sort of residency requirement--that only candidates who live south of Randolph Road are eligible for election. But, of course, this is simply not so; anyone residing in any part of a given district can file for election, and the voters are free to decide.

one of their own number.[11] As this Court held in City of Mobile v. Bolden, 446 U.S. 55, (1980):

> "It is of course true that the right of a person to vote on an equal basis with other voters draws much of its significance from the

---

[11] There was absolutely no evidence in this case supporting Appellant's apprehension that a legislator residing south of Randolph Road could not, or would not, if elected, adequately represent his or her "up-County" constituents. Logic, and political common sense, would seem to compel a contrary conclusion. See, in this connection, paragraph 10 of the Supplemental Affidavit of Helen Koss, set out in the Appendix to this Motion at pages 32-33. In his Supplemental Memorandum filed April 14, 1982 (Appendix to this Motion, at pages 3-9), Appellant alleged a violation of the Equal Protection Clause through division of alleged "communities of interest". That matter was not expressly ruled upon in connection with Appellant's Petition and is not raised in Appellants' Jurisdictional Statement, but it was responded to by the Delegation (Appendix to this Motion at pages 15-27) and the matter of claims related to alleged "communities of interest" was dealt with--and the claims were rejected--by the Special Master in connection with Mayor Goldensohn's Petition (Appendix to this Motion at pages 34-39).

> political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court's decisions hold squarely that they do not. See United Jewish Organizations v. Carey, 430 U.S. 144, 166-167, Id. at 179-180 (concurring opinion); White v. Regester, 412 U.S. 755, 765-766; Whitcomb v. Chavis, 403 U.S. 124, 149-150, 153-154, 156-157.
>
> The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."

The Delegation submits that Appellant's claims under the Fourteenth Amendment were properly rejected by the Special Master and the Court of Appeals of Maryland. Those claims--however phrased--should likewise be summarily rejected by this Court.

IV. Conclusion

The Montgomery County Legislative Delegation respectfully submits that for all of the foregoing reasons, the instant appeal should be dismissed or, in the alternative, that the decision appealed from should be summarily affirmed, and the Delegation respectfully requests that the Court so Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 1982, I caused three copies of the foregoing Motion to Dismiss or Affirm to be mailed, first class mail, postage pre-paid, to C. Lawrence Wiser, Petitioner, 10605 Concord Street, Suite 400, Kensington, Maryland, 20895; to Stanley D. Abrams, Esquire, 7315 Wisconsin Avenue, Air Rights 3, Suite 720 North, Bethesda, Maryland, 20814, Attorney for Petitioner Goldensohn; to Roger W. Titus, Esquire, City Attorney, 502 Suburban Bank Building, 255 N. Washington Street, P.O. Box 1906, Rockville, Maryland, 20850, Attorney for the Mayor and Council of Rockville, Amicus; to Linda Lamone, Assistant Attorney General, 104 Legislative Services Building, 90 State Circle, Annapolis, Maryland, 21401; and to Stephen H. Sachs, Attorney General, Diana G. Motz, Assistant Attorney General, Robert A. Zarnoch, Assistant Attorney General, and Mary N. Humphries, Assistant Attorney General, 1400 One South Calvert Building, Baltimore, Maryland, 21202.

W. Shepherdson Abell

W. Shepherdson Abell

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ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

APPENDIX TO MOTION TO DISMISS OR AFFIRM

FUREY, DOOLAN, ABELL & HOGAN
W. Shepherdson Abell
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Montgomery County
Legislative Delegation

CONSTITUTION OF MARYLAND,

ARTICLE III, SECTION 5:

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session.

The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have

original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the state is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	
LEGISLATIVE	:	September Term, 1982
DISTRICTING OF	:	Miscellaneous No. 2
THE STATE	:	

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Petitioner alleged in item 15 of its Petition filed with the Court in this case that "The gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically due process and equal protection of the laws."

I. THE DIVISION OF AREAS WITH A COMMUNITY OF INTEREST DENIES EQUAL PROTECTION BECAUSE IT PREVENTS THOSE AREAS COMBINING TO ELECT REPRESENTATIVES OF THEIR COMMUNITY.

Petitioner dealt on pages 20 through 23 of its Memorandum previously submitted to this Court with the problem of the unnecessary division of communities of interest under the Governor's Plan. Petitioner contends that a division of a community of interest into different districts denies those in that community of interest equal protection under the laws because it denies them the opportunity to combine their efforts to elect representatives that reflect the views of their community of interest. This is exemplified in the Governor's Plan by the division of the Gaithersburg community of interest into four legislative districts and by the division of the Wheaton community of interest into

two districts.

II. GERRYMANDERING TO PROTECT INCUMBENT LEGISLATORS LIVING IN NON-GROWTH AREAS DENIES GROWTH AREAS EQUAL REPRESENTATION AND EQUAL PROTECTION.

In a leading case, the Supreme Court has ruled that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," Gaffney v. Cummings, 412 U.S. 735, 755, 93 S.Ct. 2321, 2330 (1973). The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439, 855 S.Ct. 498, 501 (1965)

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'

Legislative districts deny equal protection if they are gerrymandered so that those living in an area which is experiencing relatively no population growth, represent not only that area but also an area of nearby equal population which is experiencing growth and entitled under reapportionment on the basis of population to its own representation on a substantially increased basis.

During the 1970's most of the population growth of Montgomery County was in the northern part of the County. By drawing the legislative districts in contorted shapes, with appendages or legs hanging down from the main body of the three northern legislative districts (15, 17 and 19), the Governor's Plan provides all of the incumbent Senators and Delegates with Districts in which none of them will face incumbent opposition. Each of the three Senators representing the three northern districts live in the

appendage hanging down from the District into which they have been drawn. Thus, assuming the advantages of incumbency, the representation in the Senate (and to a large extent in the House of Delegates) for the three northern districts (15, 17 and 19) will be by Senators (and Delegates) who do not live in those areas.

By thus drawing the legislative district lines to provide that six incumbent Senators from the southern part of the County will probably represent all of the County, the Governor's Plan denies equal protection under the laws to those persons living in the northern part of the County.

Petitioner has prepared an analysis of the proportions of population and legislative incumbency north and south of a principal cross county highway, Randolph Road, which is attched as Exhibit A to this Memorandum. This analysis dramatically illustrates the denial of

equal representation to the northern part of Montgomery County.

Respectfully submitted,

C. Lawrence Wiser
Suite 400, 10605 Concord Street
Kensington, Maryland 20895
301-949-7870

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum of Petitioner was hand delivered this 14th day of April 1982, to W. Shepherdson Abell, Thomas F. Hogan, and Marianne K. Renjilian of Furey, Doolan, Abell & Hogan, 8401 Connecticut Avenue, Chevy Chase, Maryland, 20815; Stephen H. Sachs, Diana G. Motz, Robert A. Zarnoch, Mary N. Humphries, and Linda H. Lamone of the Office of the Attorney General at 1400 One South Calvert Building, Baltimore, Maryland 21202; Stanely D. Abrams, Attorney for Bruce Goldensohn at Levitan, Ezrin, West, Weinstein & Kerxton, 5454

Wisconsin Avenue, Chevy Chase, Maryland 20815, and Roger W. Titus and Sondra Harans Block, Attorneys for the City of Rockville, at Maryland at Vinson Street, Rockville, Maryland 20850.

/s/
C. Lawrence Wiser

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1982

MISCELLANEOUS NO. 2

C. LAWRENCE WISER

Petitioner

v.

HARRY R. HUGHES

Respondent

IN THE MATTER OF

LEGISLATIVE DISTRICTING OF THE STATE

MEMORANDUM OF PETITIONER IN OPPOSITION TO REPORT OF THE SPECIAL MASTER

C. Lawrence Wiser
Petitioner
Suite 400
10605 Concord Street
Kensington, Maryland 20895
301-949-7870

* * * * * * * * * *

VI. THE FEDERAL CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION

Petitioner believes that the gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically due process and equal proection of the laws.

A. The Division of Areas with a Community of Interest Denies Equal Protection Because it Prevents Those Areas Combining to Elect Representatives

Petitioner has previously discussed in this Memorandum the problem of the unnecessary division of communities of interest under the Governor's Plan. Petitioner contends that a division of a community of interest into different districts denies those person in that community of interest equal protection

under the laws because it denies them the opportunity to combine their efforts to elect representatives that reflect views of their community of interest. This is exemplified in the Governor's Plan by the division of the Gaithersburg community of interest into four legislative districts and by the division of the Wheaton community of interest into two districts.

B. Gerrymandering to Protect Incumbent Legislators All Residing in One Area Denies other Areas equal Representation and Equal Protection.

In a leading case, the Supreme Court has ruled that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," Gaffney v. Cummings, 412 U.S. 735, 755, 93 S.Ct. 2321, 2330 (1973). The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439, 855 S.Ct. 498, 501 (1965):

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'

Legislative districts deny equal protection if they are gerrymandered so that those living in one area represent not only that area but also other relatively distant areas which are entitled under reapportionment on the basis of population to their own representation on a substantially increased basis.

During the 1970's most of the population growth of Montgomery County was in the northern part of the County. By drawing the legislative districts in contorted shapes, with appendages or legs hanging down from the main body of the three northern legislative districts (15,

17 and 19), the Governor's Plan provides all of the incumbent Senators and Delegates with Districts in which none of them will face incumbent opposition. Each of the three Senators representing the three northern districts live in the appendage hanging down from the District into which they have been drawn. Thus, assuming the advantages of incumbency, the representation in the Senate (and to a large extent in the House of Delegates) for the three northern districts (15, 17 and 19) will be by Senators (and Delegates) who do not live in those areas.

By thus drawing the legislative district lines to provide that six incumbent Senators from the southern part of the County will probably represent all of the County, the Governor's Plan denies equal protection under the laws to those persons living in the northern part of the County.

Petitioner has prepared an analysis of the proportions of population and legislative incumbency north and south of a principal cross county highway, Randolph Road (Appendix C, Petitioner's Exhibit 13). This analysis dramatically illustrates the denial of equal representation to the northern part of Montgomery County (and also illustrates the effect of non-compact districts).

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	September Term, 1982
LEGISLATIVE	:	Miscellaneous Nos.
DISTRICTING OF	:	2 & 5
THE STATE	:	CONSOLIDATED

REPLY MEMORANDUM OF THE MONTGOMERY COUNTY LEGISLATIVE DELEGATION

Senators Crawford, Denis, Kramer, Levitan, Schweinhaut and Shore, and Delegates Bainum, Boergers, Chasnoff,Forehand, Garrott, Goldwater,

Hixson, Hyatt, Kopp, Koss, Maurer, Morella, Owens, Robertson, Ruben, Sher and Toth, Intervenors, hereinafter referred to collectively as the "Montgomery County Legislative Delegation", by and through W. Shepherdson Abell, Marianne K. Renjilian, and Thomas F. Hogan, their attorneys, respectfully submit this Reply Memorandum for the aid of the Special Master.

In his Supplemental Memorandum submitted on April 14, 1982, Senator Wiser attempted to flesh out his previously unparticularized Fourteenth Amendment claim for alleged denial of equal protection of the laws. Senator Wiser says two things, which are variations on a single theme:

(1) That it is a denial of equal protection to divide what he alleges to be "communities of interest"--giving

Gaithersburg and "Wheaton" as examples[1]/-- because the members of the "community" are deprived of the opportunity to "combine their efforts to elect representatives that reflect their community of

---

[1]/ Gaithersburg, an incorporated municipality, is not divided by either the Governor's Plan or the Wiser Plan. There are conflicting allegations about the existence of various communities of interest between the City of Gaithersburg, nearby areas and other municipalities. See Senator Wiser's submissions, Mayor Goldensohn's submissions, the City of Rockville's submissions, the Affidavits of Idamae Garrott and Donald B. Robertson (Exhibits 1-B and 3-B), and the Supplemental Affidavit of Helen L. Koss (Exhibit 4-B) submitted herewith. Insofar as "Wheaton" is concerned, to the extent attempts have been made to define that unincorporated and largely undefined area it is divided by the Wiser Plan as well as the Governor's Plan. See Affidavit of Helen L. Koss (Exhibit 2-B) and Affidavit of Bebe Bailey (Senator Wiser's Exhibit 19), at paragraph 5. The Wiser Plan also divides other communities, such as Olney. (See Exhibit 2-B).

interest"[2]; and

(2) the residents of Montgomery County living north of Randolph Road--a "growth area" according to Senator Wiser--are deprived of equal protection because the incumbent legislators (whom Senator Wiser assumes will all be re-elected)[3] live south of Randolph Road--allegedly in

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[2] The Delegation submits that there is no evidence--and no reason to speculate--that any group will not be able to elect a representative who will reflect their views and be responsive to all his or her constituents, wherever the district lines are drawn. See Supplemental Affidavit of Helen L. Koss (Exhibit 4-B).

[3] This assumption is based on sheer speculation of a type in which the courts have generally been unwilling to indulge. See, e.g., Wendler v. Stone, 250 F. Supp. 838, 840 (S.D. Fla. 1972); and Skolnick v. State Electoral Board of Illinois, 336 F. Supp. 839, 845 (N.D. Ill. 1971) ("Political prognostication is a dangerous and futile exercise").

a "non-growth" area.[4]/

Both of Senator Wiser's contentions rest on the underlying assumption that some interest group--be it a "community" or a "growth area"[5]/--is constitutionally entitled to representation as such and, inferrably, by one of their own. The Delegation submits that Senator Wiser's

---

[4]/ Senator Wiser has submitted no data on relative growth rates, but it would in any event be irrelevant for the reasons stated infra. Senator Wiser's "Randolph Road" theory of dividing the County is a novel one, and one which he does not follow in his own Plan. See Supplemental Affidavit of Helen L. Koss (Exhibit 4-B). Randolph Road is not a consistently used dividing line for purposes of census districts, high school districts, councilmanic districts, or recreation areas. See Affidavit of Karl Aro (State's Exhibit 5-B). Mayor Goldenson posits a tripartite division: "up-county", "mid-county", and "down-county"; (Goldensohn Memorandum, pp.16-17).

[5]/ Population growth was of course taken into account in the redistricting process to ensure substantial population equality among districts, but it is clear and unchallenged that the Governor's Plan for Montgomery County achieves substantial population equality.

claims are frivolous; his assumption is wholly without merit and has been clearly rejected by the Supreme Court.

In Whitcomb v. Chavis, 403 U.S. 124, 156-57 (1971), the Supreme Court rejected the notion that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat . . .," warning that such an approach "would spawn endless litigation."

The issue of representation of "communities of interest" was squarely confronted--and rejected--by the United States District Court for the Southern District of Florida in Wendler v. Stone, 350 F.Supp. 838 (1972). The Wendler court, in granting motions to dismiss, stated:

> "The gravamen of their complaint is a challenge to the division of economic, political, ethnic, and social groups within the affected cities, such as the senior

citizens of Miami Beach. It is argued that such alleged division reduces the influence of the vote of such interests, as a group, in the political process.

This claim is likewise nonjusticiable. It carries its own refutation. An endless list of groups with such a community of interest, covering an infinite number of geographic combinations, could be prepared. Those persons sharing an interest on one question would be unlikely to concur in their views on all questions. A court asked to accommodate those sometimes convergent, sometimes divergent, interests certainly cannot look to any judicially discoverable and manageable standards for guidance.

Counsel admitted to the Court that many redistricting plans, all satisfying the one man, one vote requirement, were possible. In such hypothetical plans, boundary lines could undoubtedly be drawn so as to encompass certain allegedly identifiable interest groups. Each plan would, however, exclude or divide certain

other interest groups. The futility of the standard championed by the plaintiffs is readily apparent.

More importantly, however, in our view, the equalization of representation demanded is not constitutionally required. The decision of the Supreme Court in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), clearly established the principle that interest groups have no constitutional guarantee of representation in legislative halls." 350 F. Supp., at 840. (Emphasis added).

The Supreme Court recently agreed, in City of Mobile v. Bolden, 100 S.Ct. 1490 (1980):

"It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

> And the Court's decisions hold squarely that they do not. See United Jewish Organizations v. Carey, 430 U.S. 144, 166-67, id at 179-180 (concurring opinion); White v. Regester, 412 U.S. 755, 765-766; Whitcomb v. Chavis, 403 U.S. 124, 149-150, 153-154, 156-157.
>
> The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."

Senator Wiser's claims for proportional representation of any group--however phrased--should, accordingly, be summarily rejected.

The Governor's Plan achieves substantial population equality among districts. There is no allegation of actionable racial, or even religious, ethnic, economic or parti an

discrimination[6]. No group, no voter, is denied access to the political process by the Governor's Plan.[7] As the Wendler court noted, any plan may unite some more- or less-defined interest groups but, in doing so, will inevitably divide others. 350 F.Supp. at 840. The Maryland Constituion, Article III, §5, entrusts the districting process--the choice of where

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[6] Even in cases of racial discrimination, the Supreme Court has held that discriminatory intent must be shown to establish a violation. See City of Mobile v. Bolden, supra. There is no suggestion of any discriminatory intent in this case. Justice Stevens' concurrence in that case, which suggests that gerrymandering aimed at religious, ethnic, economic and political groups as well as at racial minorities is actionable under the Fourteenth Amendment has not been accepted by a majority of the Court; neither has his substitute for the intent requirement ("uncouthness", significant adverse effects and irrationality). The Delegation submits, however, that the Governor's Plan is rational and would pass any of the accepted or proposed tests for constitutionality.

[7] Cf. Chapman v. Meier, 420 U.S. 1 (1973).

to draw the lines--to the Governor and the General Assembly. The Delegation submits that the Governor and the General Assembly have performed their task in a manner fully consistent with both the Maryland Constitution and the United States Constitution. The Special Master and the Court therefore should defer to their choice--and not Senator Wiser's--as to where the lines should be drawn. See Upham v. Seamon, _____ U.S. _____, 50 U.S.L.W. 3800, 3801 (April 1, 1982). The Governor's Plan should be upheld.

Respectfully submitted,

FUREY, DOOLAN, ABELL & HOGAN

By: /s/
W. Shepherdson Abell

By: /s/
Marianne K. Renjilian

By: /s/
Thomas F. Hogan

8401 Connecticut Avenue
Chevy Chase, Maryland 20815
(301) 652-6880

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 1982, I caused a copy of the foregoing Reply Memorandum and the Supplemental Affidavit of Helen L. Koss (Exhibit 4-B), to be mailed, first class mail, postage pre-paid, to C. Lawrence Wiser, Petitioner, 10605 Concord Street, Suite 400, Kensington, Maryland, 20895; to Stanley Abrams, Esquire, 5454 Wisconsin Avenue, Chevy Chase, Maryland, 20815, Attorney for Petitioner Goldensohn; to Roger W. Titus, Esquire, City Attorney, 502 Suburban Bank Building, 255 N. Washington Street, P.O. Box 1906, Rockville, Maryland, 20850, Attorney for the Mayor and Council of Rockville, Amicus; to Linda Lamone, Assistant Attorney General, 104 Legislative Services Building, 90 State Circle, Annapolis, Maryland, 21401; and to Stephen H. Sachs, Attorney General, Diana G. Motz, Assistant

Attorney General, Robert A. Zarnoch, Assistant Attorney General, and Mary N. Humphries, Assistant Attorney General, 1400 One South Calvert Building, Baltimore, Maryland, 21202.

/s/
Marianne K. Renjilian

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	September Term, 1982
LEGISLATIVE	:	Miscellaneous Nos.
DISTRICTING OF	:	2 & 5
THE STATE	:	CONSOLIDATED

SUPPLEMENTAL AFFIDAVIT OF HELEN L. KOSS

I, Helen L. Koss, hereby affirm as follows:

1. This Affidavit is made on my personal knowledge; I am not disqualified from being a witness and if called as a witness, I can and will testify competently as hereinafter stated. I am

familiar with the Governor's reapportionment plan and the Plan filed with this Court by Senator Wiser.

2. I have been a member of the House of Delegates of the General Assembly of Maryland since 1971. Since 1979, I have served as Chairman of the Constitutional and Administrative Law Committee. Since that Committee reviews much of the legislation affecting municipalities in Maryland, I have had many opportunities to observe the positions of the cities of Rockville and Gaithersburg on legislation before the General Assembly.

3. To the best of my knowledge, information and belief, as long as I have served in the legislature, there has been agreement between the positions of the City of Rockville and the City of Gaithersburg on the overwhelming majority of issues before the General Assembly affecting Rockville or Gaithersburg or both. In particular, both supported:

(a) Legislation authorizing municipalities to collect license fees;

(b) Legislation affecting cable television;

(c) Legislation affecting the payments from counties to municipalities in recognition of services provided by the municipalities;

(d) Legislation affecting municipal shares of the income tax;

(e) The state role in allocating federal revenue sharing funds;

(f) The pre-emption of municipal legislation by county ordinances (specifically House Bill 1400 and Senate Bill 661, 1982 Session, designed to modify the decision in Forest Heights v. Frank, 291 Md. 331 [1981]);

(g) The authority of municipalities to impose speed limits in school zones;

(h) The so-called "enclave bill," dealing with the procedures by

which municipalities may annex "enclaves" which are not part of those municipalities but are surrounded by municipal territory; and

(i) Legislation affecting the mass transit system for the Washington metropolitan area.

4. The list in 3 above is not intended to be by any means exclusive. In fact, I cannot recall a single piece of legislation on which Rockville and Gaithersburg appeared before the General Assembly on opposite sides, with the possible exception of the location of the outer Beltway.

5. Rockville and Gaithersburg may in fact vie with each from time to time for priority on the list of school construction projects--as may any other two communities in the County, such as Gaithersburg and Montgomery Village. Such rivalry is inherent in the school construction program, but cannot in my

opinion form a rational basis for legislative districting.

6. I have reviewed the Supplemental Memorandum of Petitioner Wiser in Miscellaneous No. 2 and his unverified "Exhibit A" entitled "Population of Montgomery County and Residency of Incumbent Legislators North and South of Randolph Road." I am intimately familiar with Randolph Road, because I have for many years resided in a district spanning both sides of Randolph Road. My residence in fact lies less than two miles from Randolph Road.

7. Contrary to Senator Wiser's assertions, Randolph Road is in my opinion not a natural dividing line between the older and newer developments of Montgomery County. It is not an arterial road. Those roads which might provide natural boundaries within Montgomery County, Interstate 495 (the Beltway) and Interstate 270, have in the past cut

through the middle of legislative districts, rather than forming the boundaries of those districts, in many instances.

8. Senator Wiser's Plan itself fails to follow Randolph Road as the dividing line between his proposed legislative districts 18 and 19.

9. Based on my experience as a legislator and on my long time residence in Montgomery County, I do not believe I have ever previously heard anyone refer to Randolph Road as the natural dividing line between "up-County" and "down-County" residences.

10. In my opinion, a comparison of the proportion of population and residences of incumbent legislators north and south of Randolph Road is irrelevant as a redistricting consideration. I am aware of absolutely no reason why someone who resides south of Randolph Road could not very competently represent voters who

live north of Randolph Road if they elect him or her to do so, and vice versa.

11. It is difficult to generalize about the positions taken by various communities, governmental units and interest groups on legislation before the General Assembly. However, in my opinion, based on my experience in the General Assembly, there is far more likely to be a divergence of interest between rural and urban residents than between "up-County" and "down-County" residents.

12. The fallacy of the division between "up-County" and "down-County" is, in my view, further demonstrated by the "Wedges and Corridors" General Plan for the development of Montgomery County. As the name indicates, this Plan is organized, not on the basis of a horizontal division between the northern and southern portions of the County, but on the basis of wedges and corridors extending radially out from the District

of Columbia. Not coincidentally, this is the general path which historic legislative districts have followed.

I hereby affirm under the penalties of perjury that the contents of the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

/s/
Helen L. Koss

In the Matter	*	
of the	*	In the
Legislative	*	Court of Appeals
Districting of	*	of Maryland
the State	*	
1982	*	

TO THE HONORABLES, CHIEF JUDGE MURPHY AND THE ASSOCIATE JUDGES OF THE COURT OF APPEALS OF MARYLAND

REPORT OF THE SPECIAL MASTER

* * * * * * * * * * *

Miscellaneous Petition 5

Petition of Bruce A. Goldensohn

Montgomery County Districts Generally, District 17 Specifically

This Petitioner's attack supports generally the contentions made in Miscellaneous Petition 2 filed by C. Lawrence Wiser previously discussed supra, but particularly attacks District 17 upon the ground that it "fail(s) the Constitutional test of compactness", and "does not give due regard to natural boundaries...in that City of Gaithersburg is separated from its surrounding neighbors...which have a close community of interest with (Gaithersburg);" and is placed in the same District as the City of Rockville...[with] different communities of interest, as well as competitive interests."

The petition avers that by "combining the two largest municipalities within

Montgomery County...into a single legislative district, the votes of citizens are debased and diluted in the election of a representative number of members of the Legislature, who will represent their interests as residents of a municipality as opposed to residents of a separate political subdivision of the State, i.e. a charter county." (Emphasis added.)

The petition concluded by asserting that the plan "was drafted and created by the incumbent senators and delegates of Montgomery County;" and that "accommodation of the incumbent ...delegation violate[d]...Article 76A, Section 7-15."[20]

This petitioner's contentions concerning constitutional deficits under Maryland Constitution Article III, Section

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[20] Incumbent Senators and Delegates of Montgomery County do not fall within the cited sections.

4 have been fully discussed supra.

His contention relating to "community of interest" is without merit. Assuming for the moment that there may be circumstances under which a failure to recognize "communities of interest" may reach constitutional dimensions, it is plain that this is not such a case.

Four claims to "community of interest" are alleged: (a) Wiser's "community of interest" between Rockville and the rural community of District 15; (b) Rockville's rejection of such an idea and assertion of a community of interest only with less affluent sections of District 15 and with two communities north of the City; (c) the Legislative plan asserting a community of interest between the two incorporated municipalities of

Rockville and Gaithersburg[21]; and (c) Gaithersburg's rejection of all of these and its assertion of a community of interest with Montgomery Village.

Cutting through the facade of petitioner's "community of interest" arguments in the attack upon District 17 by the two largest incorporated municipalities, Rockville and Gaithersburg, one stark fact emerges - the question is one of disputed fact. The resolution of this disputed fact is a legislative function that does not give rise to a constitutional issue.

The real thrust of the Rockville-Gaithersburg attack upon their joint placement within District 17 is that each believes that if placed within separate districts, it would be able to exercise greater political influence upon members

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[21] Supported by affidavit of Helen Koss, Exhibit 3B

of the General Assembly in spite of its minority population in such divided districts. Such desires conflict with the spirit if not the letter of the overriding principle of "one person-one vote."

It is recommended that Miscellaneous Petition 5 be dismissed.

* * * * * * * * * *

Office - Supreme Court, U.S.
FILED
OCT 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

v.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT
OF APPEALS OF MARYLAND

APPELLANT'S REPLY MEMORANDUM

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Appellant

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No. 82-347

IN THE

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October Term 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

v.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT
OF APPEALS OF MARYLAND

APPELLANT'S REPLY MEMORANDUM

THERE IS JURISDICTION FOR REVIEW BY APPEAL

The State asserts (State's Motion p.2) that this Court does not have jurisdiction under 28 U.S.C. §1257(2), but only under 28

U.S.C. §1257(3). The State is clearly wrong.

Section 1257(2) grants jurisdiction by appeal when the federal constitutional validity of a state statute is challenged and the decision challenged is in favor of its validity. As stated in Stern and Gressman, Supreme Court Practice (5th Ed. 1978) at page 160, "The reference in §1257(2) to a 'statute of any state' has been defined many times to include every legislative action to which a state gives the force of law. See Williams v. Bruffy, 96 U.S. 176, 183. This definition covers more than the laws passed by a state legislature."

Appellant has challenged the federal constitutionality of a part of the legislative apportionment plan of Maryland which is set forth in a joint resolution (House Joint Resolution No. 32, App. 49) passed by both houses of the Maryland

General Assembly and which pursuant to the provisions of Article III Section 5 of the Constitution of Maryland has become law.

Clearly, this joint resolution of the Maryland State Legislature, having the effect of law, is a "state statute" within the meaning of §1257(2).

THE STATE MIS-STATES THE QUESTION

The State of Maryland, in its Motion To Dismiss or Affirm, discussed an entirely different question than the question which Appellant has raised. As a consequence, the State's entire Argument goes off on a tangent and (except for a footnote in State's Motion p. 8) fails to discuss the question appellant has raised before this Court.

Appellant raised the following question in its appeal to this Court.

Whether gerrymandering of

districts drawn for election of members of a state legislative is a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those against whom the gerrymandering is directed.

Instead of responding to that question, the State stated another question which it preferred to discuss, but which is not the issue raised by Appellant, either before this Court or below:

> Is a reapportionment plan which creates legislative districts conceded to be (1) substantially equal in population and (2) in no way racially discriminatory, invidiously discriminatory because it minimizes election contests among incumbents in some legislative districts?

Appellant does not contend, and has not contended below, that minimizing election contests among incumbents by

itself is unconstitutional. But appellant does contend that gerrymandering directed against persons in particular geographical areas is a denial of equal protection to those persons and it may not be done solely for the purpose of minimizing election contests among incumbents.

Because of the weakness of their position, the State and the Special Master (himself a former member of the Maryland General Assembly) chose to support their position by ignoring the question raised by appellant and, instead, arguing that merely minimizing contests among incumbents was not unconstitutional (State's Motion p. 7, Master's Opinion, J.S. App. 36). Incredibly, the Special Master even went so far as to say that, with respect to drawing districts to minimize contests, "an incumbent properly should be permitted to receive the benefits stemming from his performance in office" (J.S. App. 37).

It may be noted in passing that the legislative districting plan has had exactly the effect its drafters sought. In the Primary Election on September 14, 1982, every single one of the nineteen incumbent legislators who sought re-election in Montgomery County were victorious.

But all of that is not the issue. The issue is a simple one: Is gerrymandering a discrimination against those who are gerrymandered against and thus a denial of equal protection to those persons?

THE QUESTION RAISED IS VERY SUBSTANTIAL

The State and the Montgomery Legislative Delegation claim the question raised by appellant is not substantial. Appellant contends the question is very substantial. If the Court accepts review of this case, and grants a decision in favor of appellant

that legislative gerrymandering is unconstitutional, it will be the most substantial, significant and important decision by this Court since the basic reapportionment decision of Baker v. Carr, 369 U.S. 186 (1962).

The question is so substantial that it goes to the very heart of our representative democracy. Is there any way in our democracy to rid our country of the discrimination of gerrymandering which seriously and significantly undermines a principal institution of our nation's democracy, its legislative bodies?

As a practical matter, only this Court can put an end to gerrymandering and make fair legislative reapportionment a reality.

THE REQUIREMENT THAT A LOWER COURT "EXPRESSLY PASS ON" A FEDERAL CONSTITUTIONAL ISSUE DOES NOT APPLY

The Montgomery Legislative Delegation argues (Montgomery Motion, pp 11-13) that the federal question raised by appellant was not expressly passed upon by the Court of Appeals of Maryland below since that Court has issued only a Per Curiam Order (J.S. App. 1) which states, in pertinent part, that "for reasons to be set forth in an opinion later to be filed", appellant's petition "failed to establish any violation of the Federal Constitution". That Per Curiam Order was issued June 4, 1982 and that Court has still not published its promised subsequent Opinion.

Rule 16.1(b) of this Court states that a motion to dismiss may be made if "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on;" (underlining added).

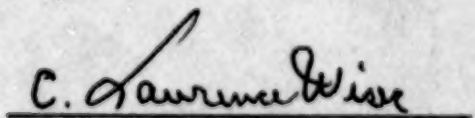
The requirement that the question "be expressly passed on is in conjunction with (not as an alternative to) the requirement

that the question has been timely or properly raised. The Montgomery Legislative Delegation concedes that the question was timely and properly raised by appellant in the court below (Montgomery Motion p.6). Therefore, it is not essential also, that the lower court have expressly passed upon the question. If this were not so, lower courts could prevent proper appeals to this Court by ignoring federal questions or, as in this case, by delaying the detailed Opinion discussing the federal question until after the ninety-day period for appeal has run (which ran in this case from the date of the Per Curiam Order issued on June 4, 1982 and which therefore expired on September 2, 1982).

CONCLUSION

Gerrymandering is an invidious discrimination which is a cancerous disease striking at the very foundations of our legislative bodies, the basic institutions of our democracy. The political realities are that the desire for perpetuation in office by legislators who draw new legislative district lines in reapportionment makes impossible, as a practical matter, the resolution of this basic problem through legislative action. Only action by this Court can put an end to gerrymandering with its discrimination against and denial of equal protection to those against whom the gerrymandering is directed.

Respectfully submitted,



C. Lawrence Wiser

Appellant